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RENOMINATION OF DONALD J. DEVINE

HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

RENOMINATION OF
DONALD J. DEVINE TO BE DIRECTOR OF THE OFFICE OF
PERSONNEL MANAGEMENT

APRIL 1, 2, 3, JUNE 5 AND 6, 1985

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RENOMINATION OF DONALD J. DEVINE

MONDAY, APRIL 1, 1985

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The committee met at 10 a.m. in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Eagleton, Chiles, Glenn, Levin, and Gore.

OPENING STATEMENT OF SENATOR STEVENS

Senator Stevens. Good morning.

We are here this morning to hold a public hearing on the confirmation of Dr. Donald J. Devine for the Director of the Office of Personnel Management. Unlike most Presidential appointments, the Director of the Office of Personnel Management must, by law, be confirmed every 4 years. The President has renominated Dr. Devine. Having served in this position for the past 4 years, Dr. Devine has a substantial track record on which to base his request for confirmation.

This has been a most difficult period for anyone to have headed this office. Because of threatening deficits, there has been great pressure to trim Government spending, causing a closer look at all Federal compensation costs, as well as the overall management of the Federal personnel system. Despite the need to reduce Government expenditures, however, we must be fair to the Federal employees and the taxpayers alike.

Dr. Devine, I do have a major concern. We are in agreement that we must reduce the cost of Government. Regardless of this fact, the functions of Government must be manned by employees with high morale and high productivity. It appears to me that employee morale is low now and that the Government is in danger of no longer attracting the highly qualified recruits that will enable our Government to perform its function in an efficient manner.

I hope that today you will address what plans you have to resolve the problems of employee morale.

Today, our first witness is Senator Jesse Helms.

Senator Eagleton. Mr. Chairman?

Senator Stevens. Yes, I will yield to my friend.

Senator Eagleton. I am sorry.

Senator Stevens. I just want to announce that he, Senator Paul Sarbanes, and Mrs. Schroeder are here. Then we will get to Dr. Devine. I yield to my good friend from Missouri.

OPENING STATEMENT OF SENATOR EAGLETON

Senator **Eagleton**. Mr. Chairman, members of the committee, 4 years ago when this committee reviewed the nomination of Donald Devine to be Director of the Office of Personnel Management, some of us on the minority side had some serious reservations about Dr. Devine's zealous conservatism, particularly as expressed in voluminous articles and other writings by him. We questioned Dr. Devine at length, and I, for one, was assured that, for example, a particularly worrisome quote dealing with his views on affirmative action was a work of political philosophy and not a work of action.

Four years later, I am unable to accept such reassurances. For 4 years, I have watched Donald Devine's philosophy transmitted into action and have fought his attempts to "reform" and some would say gut the civil service, a Government work force which my Republican colleague from Maryland, Senator Mathias, characterized at the 1981 hearing on this gentleman as "not * * * isolated from the mainstream of our Nation's life * * * instead * * * a Government that functions pretty well, thanks to the dedicated men and women on whose shoulders the structures of Government are built."

Although Dr. Devine paid lipservice to Senator Mathias' assessment, he obviously in the 4 years as Director of the Office of Personnel Management, has, with full intent, decided to pursue another course. Through active political campaigning and by employing such rubrics as "efficiency," "saving the taxpayers' dollars," "effective management," "pay for performance," "too generous Government benefits" and "in comparison with the private sector," Dr. Devine has spread his ideological net over every aspect of Federal employment, including recruitment, hiring, promotion, pay, leave, reassignments, layoffs, retirement, insurance, training, et cetera.

While, Mr. Chairman, every President, of course, picks appointees who reflect his political philosophy, I do not believe that Congress ever intended the Office of Personnel Management, which was formerly the bipartisan Civil Service Commission, to be operated on a partisan basis.

Dr. Devine, at his hearing in 1981 and in some prehearing questions this spring that were asked of him, himself said that the Director of OPM is "subject to the direction of the President." These are his words, too: "Yet it is clear," says Dr. Devine, "that the responsibility of the Director is first to the civil service rules and laws," that his responsibility, I repeat, is first to the civil service rules and laws.

Mr. Chairman, it is more than the letter of rules and laws. It is the spirit of a nonpoliticized career civil service as was enacted into law more than 100 years ago under President Arthur. In its early days, civil service came under heavy and devious attack. President Benjamin Harrison had some spoilsmen around him, sort of like the present day Devine, who wanted to do in the civil service system.

But they failed to take into account a Civil Service Commissioner named Teddy Roosevelt. Roosevelt viewed his 6 years on the Civil Service Commission as "a bright part of his public career." He and his fellow commissioners thwarted the spoilsmen and functioned, again in Roosevelt's own words, "on the basis of high principle, idealism, and merit." Commissioner Roosevelt would be repulsed by the activities of his current successor.

Under Dr. Devine's direction, OPM has operated on a partisan basis, and that reminds me only too well that in committee, when the bill was being worked on back in 1978, Senators Stevens and Mathias voted against that Civil Service Reform Act because they felt—and here are the words of Senators Stevens and Mathias—

> The bill would give the President and his political appointees enormous power over the civil service, while failing to provide prudent safeguards to encourage impartial and effective performance by career employees.

In their minority views in the Senate report on the bill, Senators Stevens and Mathias continued,

> The bill does not strike the proper balance between protection of merit principles and management flexibility in at least three major areas: the organizational structure, competitive examinations, and the Senior Executive Service.

Mr. Chairman, how prescient you and Senator Mathias were. I am envious that I didn't write such a statement back then.

The purpose of the 1978 act was to make civil service more efficient and more effective. The purpose of the 1978 act was never to politicize the system. The question now is, must Congress change the law if we in Congress expect the OPM Director to adhere to a standard of a nonpoliticized civil service, or must Congress change the Director? That's what these hearings are all about.

Thank you, Mr. Chairman.

Senator STEVENS. I am happy to accommodate my good friend. I know Senator Helms is, too, because he has to chair another hearing.

At this time I would like to have letters from Senators Thurmond, Laxalt, Hatch, Abdnor, Quayle, and Symms entered into the record following Senator Eagleton's opening statement.

[The letters of Senators Thurmond, Laxalt, Hatch, Abdnor, Quayle, and Symms follow:]

THE PRESIDENT PRO TEMPORE,
U.S. SENATE,
Washington, DC, April 1, 1985.

Senator WILLIAM V. ROTH,
Chairman, Committee on Governmental Affairs,
Washington, DC.

DEAR MR. CHAIRMAN: It is a pleasure for me to write to you in support of Mr. Donald J. Devine's confirmation as the Director of the Office of Personnel Management.

Mr. Devine has proven to be an effective administrator and a dedicated supporter of the Administration. During the past four years, Mr. Devine has demonstrated his ability to administer the merit system for federal employment, and he is to be commended for his efforts to encourage the effectiveness of the Government employee.

Your careful consideration of Mr. Devine's achievements and your swift confirmation of his re-nomination would be greatly appreciated.

With kindest regards and best wishes,

Sincerely,

STROM THURMOND.

U.S. Senate,
Washington, DC, April 1, 1985.

Hon. William V. Roth, Jr.,
Chairman, Senate Committee on Governmental Affairs.

Dear Bill: I understand your Committee will soon be acting upon the pending renomination of Office of Personnel Management Director Donald Devine.

This short note is simply to reiterate my continued support of Don and the leadership he has shown at the helm of OPM. During these difficult times of budget austerity, I believe that Don has not only displayed exemplary abilities to manage the agency but has demonstrated a commitment to working with government workers to accomplish several Administration and Congressionally directed objectives.

I hope you will consider my support of Mr. Devine and expedite the Committee's review of his nomination. In advance, thank you for your consideration of this matter.

Sincerely,

Paul Laxalt,
U.S. Senator.

U.S. Senate,
Washington, DC, April 4, 1985.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs,
Washington, DC.

Dear Bill: I join with my distinguished colleagues who are writing to you in support of the committee's favorable consideration of the renomination of Dr. Donald J. Devine for the position of Director of the U.S. Office of Personnel Management.

Dr. Devine has been an effective and resourceful executive manager of our nation's civil service system. He has ably carried out the President's policies, as reflected in the continuing reduction in OPM salaries and expenses which have been reduced by 17.5 percent. He has honored his pledge to Congress not to sacrifice essential public sector services.

Dr. Devine continues to promote excellence as the primary performance criterion in our federal personnel management system. Under his leadership, OPM issued and revised regulations intended to give performance a greater role in granting raises and taking personnel actions. Of OPM's proposals, The Washington Monthly observed that, "(the) indifference to performance is . . . central to the declining efficiency of both American industry and government . . . the Reagan administration, to its great credit, is trying to do something about this . . . "

As chairman of the Senate's decision making panel most knowledgeable about, and having most to do with, our nation's civil service work force, you are the first to appreciate the difficult and perhaps unique task assigned to the Director of the U.S. Office of Personnel Management. In light of this and as measured by his efforts and achievements, Dr. Devine deserves reappointment. I firmly support President Reagan's request that the Senate renew his OPM Director's term of office.

Sincerely,

Orrin G. Hatch,
U.S. Senator.

U.S. Senate,
Committee on Appropriations,
Washington, DC, March 28, 1985.

Hon. William V. Roth,
Chairman, Committee on Governmental Affairs,
Washington, DC.

Dear Bill: Since Dr. Donald J. Devine is being re-nominated as Director of the Office of Personnel Management, please register my strong support.

As Chairman of the Senate Appropriations Subcommittee on Treasury, Postal Service and General Government, it has been my privilege to work closely with Dr. Devine on OPM's agency budgets and programs. He has been controversial, but he has been straight forward. In terms of keeping OPM's own house in order, Don Devine is a highly successful manager. He has delivered a better product with fewer resources year after year. His success in eliminating an awesome backlog of retirement claims is well known.

For FY 1986, Dr. Devine is requesting an agency budget that represents a 17.5% reduction in salaries and expenses; beyond that, he has proven innovative and imaginative. The agency was named "Employer of the Year" by District of Columbia Rehabilitation Association in 1983 for hiring more handicapped persons referred by the association than any other federal agency or private sector employer. Average sick leave usage at OPM has dropped and formal EEO complaints also decreased 27% during the same periods. In 1983, OPM trained almost 195,000 federal employees for only $8.00/hour compared to $10.00 in the private sector.

Don Devine would be the first to say that much work remains to be done. But he has established a strong and excellent record at OPM.

Sincerely,

James Abdnor,
Chairman, Treasury, Postal Service and General Government Subcommittee.

U.S. Senate,
Washington, DC, March 21, 1985.

Hon. William V. Roth,
Chairman, Senate Committee on Governmental Affairs,
Washington, DC.

Dear Bill: I understand that Donald J. Devine's name has been resubmitted by President Reagan for another term as the Director of the U.S. Office of Personnel Management.

As an administrator and a manager, I believe that Don Devine has done an outstanding job. During his past four years at OPM he has instituted a series of managerial and administrative changes that will have netted $18 billion in savings to the taxpayer during the life of this Administration. I have also been very interested in OPM's performance management initiatives, and have actively supported them.

I believe that Dr. Devine has been an outstanding public servant during the past four years. I support his appointment as Director of the Office of Personnel Management for the next four years. I would appreciate it if you would enter this letter in the record. I would also appreciate your keeping me apprised of any hearings or other Congressional action with regard to Don's renomination.

Sincerely,

Dan Quayle,
U.S. Senator.

U.S. Senate,
Committee on the Budget,
Washington, DC, March 29, 1985.

Hon. William B. Roth, Jr.,
Chairman, Committee on Governmental Affairs,
Washington, DC.

Dear Bill: It is my understanding that Don Devine, Director of the Office of Personnel Management, is still pending reconfirmation in your Committee.

OPM, under Don's leadership, has served as a model of efficiency for other federal agencies through aggressive and sound management practices. Don has been in the forefront of this Administration's efforts to economize and to fight government waste. Through administrative initiatives, his agency will have saved a phenomenal $18 billion. Since Don has never shrunk from his duties and his commitment to deficit reduction, he has been subject to criticism from interests inside the Beltway. I can assure you, however, that most Idahoans, and most Americans too, are deeply appreciative of his public service and his dedication to the Reagan promise to make government less costly, and less intrusive.

I urge you to do all you can to expedite Don's reconfirmation through your Committee.

With best regards,

Sincerely,

Steve Symms,
U.S. Senator.

Senator **Stevens**. Senator Gore, do you have an opening statement?

Senator **Gore**. Yes. I would ask unanimous consent to put it in the record, Mr. Chairman.

[Senator Gore's opening statement follows:]

OPENING STATEMENT OF SENATOR GORE

Thank you, Mr. Chairman. I would like to say from the outset that I personally have grave reservations about this nomination.

When the Congress created the Office of Personnel Management, it did so with the intention of having a director who was a professional public administrator, not someone driven purely by political motivation. This was part of an effort to continue the tradition this country has had for a century now of a professional corps of civil servants, who serve the public, not its politics.

Yet during Dr. Devine's tenure we have seen a disturbing trend where this important agency has been increasingly politicized. Dr. Devine has carried on a high degree of political activity, as have his aides. Moreover, there seems to be increasing evidence that the federal employees in this country are subtly but definitely being forced to serve the political ideology of its director.

Moreover, we have before us a long litany of personnel policies, affecting every facet of federal employee's pay and benefits where the employee is being told he must accept less for his service.

Lastly, Mr. Chairman, I have serious questions about Mr. Devine's financial management of our civil service system.

I look forward to these hearings.

Senator **Stevens**. Senator Helms, we are happy to have you with us today.

TESTIMONY OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator **Helms**. Mr. Chairman, thank you very much, let me say that an honest man has appeared [laughter] with regard to his statement. I will extrapolate just a little bit, and I won't be long. But thank you very much, Mr. Chairman, for the courtesy in letting me appear.

I strongly support President Reagan's nomination of Donald J. Devine for another term as Director of the Office of Personnel Management. Dr. Devine has succeeded in turning the perennially dull issue of Government expenditures into one of the liveliest topics in Washington, DC. He has done so not with empty rhetoric, but with creative and sound proposals, particularly in the area of pay for performance. Obviously, he hasn't pleased everybody, particularly inside the Beltway, but I imagine that if a referendum could be taken among the American people all across this land, Don Devine would enjoy an overwhelming endorsement.

In his management of OPM, he has demonstrated that Government agencies can be managed intelligently and effectively and courageously and produce better results with fewer taxpayer dollars. His philosophy of Federal personnel management is the best evidence as to why the Senate should reconfirm him.

He has said, for example, and I quote him,

> The Federal Government has a highly skilled work force. But its corporate structure needs reform. It is not inclined to act, it does not tend to listen, it does not encourage autonomy and entrepreneurship, it does not stick to its essential functions, it is not lean or simple in form, it pays too much and defers compensation too long while it retires people as early as 55, and its organization is too decentralized on staff and too centralized on line functions.

Mr. Chairman, for an official of the U.S. Government to make a statement of that sort is bound to risk of lot of barbs and criticism, and I imagine that Don Devine will hear such criticism today. But the fact remains that he is a courageous man who, at a difficult time, as the chairman has said, is doing a splendid job.

He has a thorough understanding of both the potential of our civil servants and the difficulty of achieving that potential given the problems of Government. I happen to know personally that the President has the highest confidence in Don Devine and his record at OPM and his ability, and I share that confidence. I believe that the American people share it, as well, and I believe they consider themselves fortunate that he is willing to serve another term.

I come this morning voluntarily to urge the committee to act favorably on this nomination. Mr. Chairman, I will be deeply grateful if an interview with Dr. Devine which appeared in the August 29, 1983 issue of U.S. News & World Report would be included in the record at the conclusion of my remarks.

Senator STEVENS. It will be.

Senator HELMS. I thank the Chair, and I might add that I hope that all Senators and others will read this interview, because it describes several sound Federal personnel reforms. That is all the time that I will take, Mr. Chairman and members of the committee, and I do thank you for letting me appear and letting me appear first, and with your condolences, I will now proceed to the Foreign Relations Committee.

[The interview referred to follows:]

[From U.S. News & World Report, Aug. 29, 1983]

A SYSTEM THAT WASTES MANY GOOD PEOPLE

(Interview with Donald Devine, Director, Office of Personnel Management)

Q. Mr. Devine, why are federal workers the subject of so much public criticism?

A. It's not that we have bad people. Certainly by any objective measure—education, skill level, even performance—federal employees measure up against their counterparts in the private sector. But government does have a lot of inefficient personnel systems. That's what we've got to change.

Q. How would you go about improving the system?

A. One thing we've proposed is a major reform of the retirement system. Right now, retirement benefits are so generous that a federal employee can't afford to stay working for the government. Federal workers can retire at age 55 with 30 years of service and pick up a pension that's very generous compared to one in the private sector.

We've got the wrong incentives in the system. Many retire early, go out in the private sector, collect what they made in government and then get the private retirement pension on top of everything. We lose our people, especially at the executive levels, just when they're reaching the top of their potential. We waste years of training.

The current system is also destructive to people's motivation. We have many people in the government in their 40s who can tell you when they're going to retire. They're looking 10, 15 years in the future. It's not good for people to focus that far out.

In addition, there are also some very good economic reasons for changing the retirement system. We have an unfunded liability of half a trillion dollars: That is, we have a future commitment to pay out 500 billion dollars with no money now in the bank to do it. The national debt is about a trillion dollars. If you added the unfunded liability from this pension system, it would put the national debt at 1.5 trillion.

We've got a big system, an expensive system. For that reason alone, we should look at it.

Q. Is government pay too high?

A. We've done some studies on pay. We tend to pay more than the private sector except at the very top levels. We underpay seriously at the very top, at the executive level. That is a problem. But in general we pay as well as the private sector—and better in most cases.

Q. In addition to cutting benefits, you've called for freezing pay. Won't cuts in pay and benefits make it harder to attract top-flight people in government?

A. Anytime you reduce compensation, it's going to have some negative effects on recruiting people. But we're still extremely competitive with the best in the private sector. Even if we froze government pay, we'd still pay above the private sector. And if we reduced retirement benefits, they would still be way beyond what most people get in the private sector.

Our applicant-to-hire ratio is as high as it's ever been. We still have a lot of people looking for federal employment. We can keep the high quality of our work force.

Q. Why have you proposed linking pay to job performance instead of to seniority?

A. Since 1978 we've had a pay-for-performance system for people at the top. We've rewarded the best senior executives with very substantial bonuses. It's a simple idea. It works. Now we want to extend that concept to the rest of the civil service.

Currently, people get automatic raises based on how long they've been in the job. We think they should be rewarded on the basis of performance.

Q. Many critics of performance evaluation say that it's essentially a "buddy system" in which friends give other friends bonuses. Have you run into that?

A. I don't think that, in general, is the case. The administrator of a program can prevent any tendency toward a buddy system.

Q. Some employees charge that performance evaluations are sometimes used by political appointees to punish out-of-favor civil servants. Do you see this happening?

A. The political issue that's raised is a red herring. Even if the political appointee wanted to punish employees, it's just impossible to do. We've got protections in the system.

There's the Office of Special Counsel, which is responsible for investigating personnel abuses and recommending remedies to the Merit Systems Protection Board. That board's independence is assured because it is separated from the Office of Personnel Management.

Another major protection is the media. You couldn't run the civil service in a politically biased way and get away with it for very long. The attempt in the Nixon administration to do some of this went on for a couple of months, and then it hit the front page. It's just not credible to think that you can do any real politicization. We're not going to do it anyway. It's impractical, and it's not going to happen.

Q. Yet some critics charge the civil service has been politicized under the current administration—

A. There is no danger of politicization of the career service. Right now, political appointees make up only 0.15 of 1 percent of the federal work force. There's no danger of a spoils system coming back.

I think the beauty of the system is that you have both the core of career service and the political appointees. The career service is by nature conservative, with an attachment to the status quo and a reluctance to change. The positive side to this is permanence, expertise and long experience. But if there was just a career service, there would never be any change.

The political appointee's job is to carry out the President's program. But more fundamentally, in terms of how the system operates, the political appointees bring new ideas, vitality and change into the organization.

Q. Are nonpolitical career civil servants responsive enough to shifts in political administrations?

A. My experience has been that they are. I suspect that there are some places where that's less true. Probably the Environmental Protection Agency is an example where there seemed to be much more of a reluctance on the part of the career employees to go along with the agenda of the new political leadership. But I think it varies a great deal from agency to agency. It's not beyond the ability of the political leadership to work with the career people.

Q. Can business principles be applied to government?

A. It can never work ideally because government is, by its very nature, different. Dean Sayre of Columbia University used to say, "There are many similarities between business and public administration—all of them trivial." And I think there's a lot of truth to that. On the surface they look very much the same, but they're different.

There's no bottom line in government. You don't have that profit-and-loss sheet to guide you Labor doesn't have to worry about driving management out of buiness. Government is never going to go out of business. You can be as unreasonable in your demands as you want. There's very little reason for management to protect the rights of management.

There will never be a full analogy to the private sector, but that doesn't mean that you can't bring in certain tools that we know help the private sector. A performance-appraisal system, for example, is more important in the public sector. In the private sector there are other measures and warnings. If a company's profits are dropping, it sends signals to people to make some changes. We don't have those things in the public sector in most cases.

Q. Now that we are entering a recovery, are applications for civil-service jobs declining and is there any change in the quality of applicants?

A. Five years ago, we had about 10 people applying for each job; now we have 9.3. There's been a slight decline, but nothing to be alarmed about.

For our administrative and professional jobs, we have about 20 people lining up for every job; for our mid-level managerial, about 30.

We don't have any problem recruiting people. We don't see any change in the quality in terms of the score levels.

Q. Why would the best and brightest choose a government career when bureaucrats have such a poor image and the civil-service system is undergoing reform?

A. People, especially at the top levels, go in because it's tremendously exciting and challenging to think that you can be part of setting the laws for the rest of the country. That will always be the prime attractiveness to government: To be part of something big, exciting and powerful.

Senator STEVENS. Senator Eagleton, do you have questions?

Senator EAGLETON. Yes, I have some questions.

Senator Helms, did Dr. Devine participate in your 1984 campaign in North Carolina?

Senator HELMS. I do not know.

Senator EAGLETON. You don't know that he came to North Carolina and gave a speech, espousing your candidacy during the 1984 campaign?

Senator HELMS. Well, we had just about everybody there except Tom Eagleton. [Laughter.]

But I don't know.

Senator EAGLETON. You had the endorsement, didn't you, of some 22 or 23 U.S. Ambassadors serving abroad?

Senator HELMS. Apparently so, yes, sir.

Senator EAGLETON. Including the Ambassador to France and other so-called political appointee Ambassadors?

Senator HELMS. That is correct.

Senator EAGLETON. So you knew about that?

Senator HELMS. Yes, sir.

Senator EAGLETON. Now, you don't know whether the head of OPM, Director Devine, came to your State and supported your candidacy in 1984?

Senator HELMS. I will be glad to inquire. I know that he supported me, but I did not see him if or when he came to North Carolina. I hope he did.

Senator EAGLETON. Are you aware that your committee, one of your several committees, the Helms for Senate Committee, reimbursed Mr. Devine for travel and lodging expenses incurred making public appearances, plural, in North Carolina of $291.78?

Senator HELMS. No, but if they did, I'm glad they did, Senator. [Laughter.]

Senator EAGLETON. It uses the word "appearances," so that's plural, so that's more than one.

Senator HELMS. Generally. [Laughter.]

Senator EAGLETON. Who on your staff made contact with Director Devine's office to seek his participation and appearance in North Carolina?

Senator HELMS. Obviously, if I'm not aware that he came, I wouldn't be able to answer that question, sir.

Senator EAGLETON. Do you know a Mr. Alan M. Wandling? Does that name ring a bell?

Senator HELMS. No, sir.

Senator EAGLETON. Are you aware that Director Devine has five appointees that are referred to in Washington as the "Devine Thought Control Officers" and the "Devine Commissars," one assigned to each of five regions throughout the United States?

Senator HELMS. No, sir.

Senator EAGLETON. Is North Carolina serviced insofar as OPM is concerned out of the Philadephia-Atlanta Office?

Senator HELMS. Senator, you are embarrassing me, but I don't know the answer to the question.

Senator EAGLETON. It is not serviced out of the New York-Boston office?

Senator HELMS. I have no idea.

Senator EAGLETON. Or the Denver-Dallas office?

Senator HELMS. I have no idea.

Senator EAGLETON. Or the Chicago-St. Louis office?

Senator HELMS. I have no idea.

Senator EAGLETON. I think it is given that it is serviced out of the Philadelphia-Atlanta office. You have never heard of and do not know Mr. Alan Wandling?

Senator HELMS. I don't want to offend the gentleman, but if I have ever heard of him, his name doesn't ring a bell this morning. Of course, it is Monday morning, April 1. [Laughter and applause.]

Senator EAGLETON. Do you know the name of the regional director for OPM of which the State of North Carolina is a part? That is, there are five regions. Is Director Devine here?

Director Devine, how many regions of OPM are there currently in existence?

Mr. DEVINE. There are 10.

Senator EAGLETON. And you want to reduce it to five, is that not correct? Is that not correct? Would you stand up, Mr. Devine? I am a little hard of hearing.

Senator STEVENS. Wait a minute. I am going to run this hearing, Tommy.

Senator EAGLETON. I want the names of the regional directors.

Senator STEVENS. Under the law, he must be sworn.

Senator EAGLETON. All right. All right. Do you know a Mr. Alan Wandling, Senator Helms?

Senator HELMS. No, sir.

Senator EAGLETON. That name doesn't ring a bell as being the regional director of OPM operating out of the Atlanta region?

[Senator Helms nodded no.]

Senator EAGLETON. Did he have anything to do with the arrangement for Mr. Devine to come to North Carolina insofar as you know?

Senator HELMS. As far as I know—well, I don't know.

Senator EAGLETON. He did the advance work for Director Devine when he came to North Carolina?

Senator HELMS. Pardon?

Senator EAGLETON. The advance work. Are you familiar with the term "advance work"?

Senator HELMS. I have no idea what you are talking about. I don't know where you are chasing this rabbit.

Let me put it this way: I know nothing of Mr. Devine's business, but if he came, I appreciate it. I hope that our folks treated him cordially and courteously.

Senator EAGLETON. If advance work was done in preparation of Director Devine's visit to North Carolina for appearances, plural, in your political campaign and that advance work was done in whole or in part by an individual or individuals part of the civil service system, would that not, in your opinion, be a violation of the civil service law?

Senator HELMS. Senator, this committee would be a better judge of that than I. I don't know the circumstances. You are speaking hypothetically as far as I know.

Senator EAGLETON. If press releases were prepared in the office of the Director of OPM or in the regional office of OPM, would that not be a violation of the civil service law?

Senator HELMS. Press releases saying what?

Senator EAGLETON. Espousing the Helms candidacy, supporting speeches or excerpts from speeches.

Senator HELMS. Senator, I would have to see the material that you are talking about. You are talking about an unknown quantity, as far as I am concerned.

Senator EAGLETON. Do you consider Director Devine to be an unknown quantity?

Senator HELMS. No, and neither do you or you wouldn't be pursuing this line of questioning.

Senator EAGLETON. But he was unknown as far as you are concerned when he appeared in your home State on more than one occasion.

Senator HELMS. I repeat that we had 200 or 300 Americans coming to that State in the campaign to offset some of the other things going on. If you want to fight the campaign over, Senator, I would be glad to do it right now or any other time.

Senator EAGLETON. Did the Secretary of State, Mr. Shultz, come to North Carolina to make a political appearance on your behalf in 1984?

Senator HELMS. Not that I know of, no.

Senator EAGLETON. Did the Attorney General of the United States, William French Smith, come to North Carolina to make an appearance on your behalf?

Senator HELMS. I will give the same answer that I gave to the question on Mr. Devine.

Senator EAGLETON. Did the Secretary of Defense, Secretary Weinberger, come to North Carolina to make a political appearance on your behalf in 1984?

Senator HELMS. Not that I am aware of, but I wasn't aware of Mr. Devine.

Senator EAGLETON. How can you be not aware, how can you be not aware of whether the Secretary of State of the United States, the Secretary of Defense, or the Attorney General of the United States came to your State in 1984 to appear on your behalf? How can you be so blissfully sublime on that issue?

Senator HELMS. I don't know what you mean by blissfully sublime. I am just trying to answer your question.

I am answering the questions as best as I can, Senator. I didn't know I was going to be cross-examined, but proceed. I would be delighted.

Senator EAGLETON. It is your statement before this committee that you don't recall one way or the other whether the Secretary of State, the Secretary of Defense, or the Attorney General of the United States came to your State in 1984?

Senator HELMS. I don't recall that they came, no, sir.

Senator EAGLETON. They might have?

Senator HELMS. I don't know.

Senator EAGLETON. They might not.

Senator HELMS. You have done the research on it. Why don't you tell the audience?

Senator EAGLETON. You don't know?

Senator HELMS. I answer your question as you asked it, sir. I told you that I don't know that they came.

Mr. Chairman, I don't know whether senatorial courtesy is involved here, and I don't mind answering Senator Eagleton's questions, but if he wants to make a political forum out of this, I am prepared to do it.

Senator EAGLETON. I am not making a political forum out of this.

Senator HELMS. Of course you are, of course you are.

Senator EAGLETON. You are here to introduce the nominee or the candidacy to renominate——

Senator HELMS. Whom you oppose.

Senator STEVENS. Senator?

Senator EAGLETON. Whom I oppose. Yes, you are here to vouch for him as a worthy person——

Senator STEVENS. Senator, Senator.

Senator EAGLETON. For the Director of OPM.

Senator HELMS. Yes, sir.

Senator STEVENS. Senator, I think the witness has the right to direct a question to the Chair. I think all witnesses would be advised, and Senators, too, that this is going to be a long hearing, but we might as well have a little decorum here. Senator, the question of senatorial courtesy is something that the Chair has a hard time interpreting at this point. I am sure you are aware.

Senator HELMS. I am well aware.

Senator STEVENS. I do believe that the Senator is entitled to address questions to you as a witness.

Senator HELMS. Certainly.

Senator STEVENS. I must say that I fail to see the relevance of some of the questions, but he is entitled to address questions to you. In fact, I am checking the rules right now to see how far this may go.

Senator EAGLETON. I am about concluded and I will state the relevance. There has been a tradition in this country, Mr. Chairman, that certain high Government officials, members of the President's Cabinet, including the three positions that I mentioned, Secretary of State, Secretary of Defense, and Attorney General, do not actively engage in partisan politics insofar as the support of candidates for Congress, the Senate, or, indeed, the Presidency of the United States. Those positions are deemed to be above and beyond the normal call of political duty.

The same tradition existed by law until 1978 with respect to Civil Service Commissioners. Never in the history of the civil service system did members of the Commission—even going back to one of the most revered, Theodore Roosevelt, almost 100 years ago—did a Civil Service Commissioner engage in active partisan politics on the behalf of a congressional candidate or a senatorial candidate.

When the act was changed, Mr. Campbell became the Director, as I recall, in the tag end of the Carter administration. He did not engage in partisan politics in the 1980 election campaign. He didn't give speeches or make appearances for congressional or senatorial candidates or, indeed, for the person that appointed him to his office, namely President Jimmy Carter, who was running in 1980.

Yet Donald Devine, political practitioner, and now political spoilsman, went parading around this country, not only obviously in North Carolina where he made appearances, plural, but in a whole host of other States—about which I will later inquire when Mr. Devine is a witness—on behalf of candidates for the Congress and the State or as a hatchetman against incumbent Members of the Congress of the United States. He has degraded, Dr. Devine has, the civil service system. He has disparaged the memory of those who created that system and those, once again, like Theodore Roosevelt, who made it flourish. He has brought the system into disrepute by his crass political activity.

That is why I have questioned Senator Helms, who comes before us today and vouches for the legitimacy of reappointment of Donald Devine, as to what it was that Donald Devine did in Senator Helms' State.

Senator Helms, on the issue, is vacuous, doesn't remember. I tried to test his memory. He didn't even remember about the Secretary of State, the Attorney General, or the Secretary of Defense. Didn't remember that either.

He remembers getting the endorsement of 22 Ambassadors of the United States, another unprecedented act in American history, but can't even remember whether the three highest Cabinet officials of this country came and participated. I doubt they did. I think George Shultz and Caspar Weinberger and Attorney General William French Smith might respect their offices too much and respect the traditions of this country too much to engage in partisan political activity considering the offices they hold.

But Donald Devine doesn't respect his, and that's why I inquired of Senator Helms as to this issue.

I have no further questions for Senator Helms.

Senator **Stevens**. Senator Gore?

Senator **Gore**. No questions, Mr. Chairman.

Senator **Stevens**. I thank you, Senator, for coming. You may respond, if you desire.

Senator **Helms**. May I conclude?

I don't know whether Senator Eagleton is accusing Dr. Devine of violating the law. If he is, then I think he ought to put on his evidence. He referred to me as vacuous. I answered the question from the Senator.

Senator **Eagleton**. Vacuous in your memory.

Senator **Helms**. I will yield to the Senator until he gets through, and then I will make my comment.

May I proceed?

Senator **Stevens**. The Senator may proceed.

Senator **Helms**. The Senator from Missouri asked me if I knew whether the Secretary of State and the Attorney General and others had appeared in North Carolina on my behalf. I answered the question honestly. I said no, I don't know.

If you had asked me: "Do you believe that they appeared?" which is the question you should have asked, Senator, I will say, "No, I do not," but that is not the question you asked. I answered the question you asked.

Senator **Eagleton**. Senator Helms, I am concerned about your beliefs very much. The whole country is very concerned about your beliefs. I am asking you about your knowledge.

Senator **Stevens**. Senator Helms' beliefs are not at issue in this hearing.

Senator **Eagleton**. He raised it.

Senator **Stevens**. No, he didn't at all. [Laughter.]

I think the Senator has gone far afield.

Senator **Helms**. Thank you, Mr. Chairman.

Senator **Stevens**. Thank you for your appearance. [Applause.]

Senate rules forbid demonstrations, and the Chair will clear the room if there are any demonstrations.

Our next witness is the Senator from Maryland, Senator Sarbanes.

TESTIMONY OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator **Sarbanes**. Mr. Chairman, I appreciate this opportunity to appear before the committee. I want to say at the very outset that this is a very important hearing which is being held here because I think the integrity of the civil service is at issue.

Mr. Chairman, you have been sensitive in the past to the need for professional quality in the civil service; I think those standards are under assault because of the activities of Director Devine and those whom he has chosen to assist him. It is imperative that this hearing delve carefully and thoroughly into a whole range of activities. I am prompted to be here, Mr. Chairman, in part, because we have a long tradition in my State of support for the career civil service. In fact the first civil service appointee after the enactment of the Pendleton Act was a Marylander who was appointed to a Post Office clerkship in August 1883.

Second, I have been hearing as I travel through my State, from numerous civil servants and from their families about the concern and apprehension which they feel with regard to what is happening to the civil service.

Third, I have had my own personal experience with Devine's politicizing of the Federal civil service on which I will touch shortly.

Mr. Chairman, I think that a nonpolitical civil service is important to this country. We've operated on that premise now for over a century. We sought protection against the 19th century spoils system and established a Civil Service Commission and put it on a bipartisan basis. In 1978 we made certain changes in that arrangement. There was concern at the time by some that the organization's split would encourage the politicization of the civil service. Instead of having a personnel policy made by a bipartisan body, it would be made by a single administrator who originally was to serve at the pleasure of the President.

Mr. Chairman, you and Senator Mathias took the lead in opposing that provision and argued at the time in your dissent in the committee report:

> This legislation must be rejected by the Senate and returned to the committee for additional consideration, for it clearly fails to meet the central purpose of needed civil service reform. That purpose is to give the President and Federal managers more discretion and flexibility in personnel management while at the same time assuring a civil service system based on merit principles rather than political and personal favoritism.

Through the conference process that law was amended at least to provide for a limited 4-year term. This is a rather unique situation we face here. This appointee faces a very different requirement than even Cabinet officials, who continue in office and do not have to come back to the Senate for reconfirmation. In the conference report on the Civil Service Reform Act of 1978 it was stated that the 4-year term was provided, and I quote, "In order to provide the Director with a measure of independence from the President." It was also noted at the time that by limiting the Director's term you would ensure Senate review of the Director's activities and the conduct of his office and offer the opportunity to check political abuse.

This is the first opportunity that there has been to pass on an incumbent's performance and therefore the nature of the committee's hearing and the judgment it renders will establish an important precedent with respect to the functioning of the civil service, this very important part of our government, and particularly the principle of whether it is going to be conducted on a nonpolitical basis. I submit to you, and the testimony already has indicated, that there has been a marked politicization of the Federal service by Dr. Devine.

This appointment is outside the merit system and the Director by statute and by design is to help the President execute his policies through the Federal service. I do not believe that the change made in 1978, when we dropped the bipartisan Civil Service Commission, was meant to lead to the consequence of having a Director who can run rampant politically. I want the committee to stop and think very carefully about this.

What is the responsibility of the Director in terms of political participation? Now this Director has been extraordinarily active politically. He went into a number of 1984 campaigns and was reimbursed by the campaign committees for travel and lodging. Campaigning in one Member's district, Dr. Devine said, and I quote him as reported in the press, "Congressmen are like snowflakes, one or two don't make a difference, but a lot of bad ones are a problem. Unfortunately you've got one here." Mr. Chairman I want to ask you to stop and just think for a moment, what your reaction would be if the head of the Office of Personnel Management, responsible for the effective application of the civil service laws for the Federal work force, were to come into your State in a campaign and undertake this kind of political activity. I believe every one of us would conclude that he ought not to be engaged in that kind of activity, and to do so, it seems to me, is a breach of his responsibilities under the spirit of the law.

I encountered this political activity myself because an Associate Director of OPM took a leave—I assume took a leave, it is not altogether clear—came into Maryland in order to be the campaign manager for my opponent and then resumed his employment as Associate Director a few days after the election. I want you to stop and think what it means if OPM is to be the stable for political hitmen running all around the country engaged in these partisan campaigns. What kind of message does that send to the Federal employees? What does that say about a nonpolitical civil service system? The very people at the head of the system are engaged in politics in the most partisan way.

Senator **EAGLETON**. What was the name of that individual?

Senator **SARBANES**. George Nesterczuk.

There was an editorial 2 years ago in the Public Administration Times, the journal of the National Academy of Public Administration, entitled, "Political Irresponsibility at OPM," which we have submitted to the committee.

[The article referred to follows:]

[From the Public Administration Times, Jan. 1, 1983, published by the National Academy of Public Administration]

POLITICAL IRRESPONSIBILITY AT OPM

Political responsibility and accountability of the public service through law are fundamental to American political thought. They are basic in public administration, and they have dominated most practice. Actions taken the day following the November election by the U.S. Office of Personnel Management Director, Donald J. Devine, undermine those important governmental principles.

Most serious was action which, if not a clear violation of Hatch Act provisions, is such a gross affront to its purpose that the law has no meaning. George Nesterczuk, a Maryland political associate of Devine, was appointed following the 1980 elections as an OPM associate director, urged to head the former Bureau of Executive Personnel, and later in charge of OPM's internal management, with continued oversight of executive workforce matters, including State Executive Service.

Those appointments were consistent with provisions of the Civil Service Reform Act of 1978, which permit politicization of such positions. While many may doubt the wisdom of such an appointment, we would not question its legal propriety. Nesterczuk left OPM in 1982, however, to manage the Maryland campaign of Larry Hogan for the U.S. Senate. His candidate lost. The following Monday, Nesterczuk was back at OPM, reappointed to his former position. The career executive who had performed the job during the absence was also moved back to his earlier position under Nesterczuk.

The Hatch Act provides that an agency cannot agree to hold a position open for a person who leaves to work in a political campaign. Devine has been quoted as saying that "There is nothing illegal or wrong about that, as long as no agreements are made beforehand."

Devine's action is political irresponsibility at its worst in that it's contemptuous of the purposes of the law, even if, by some contortion, it may not be a technical legal violation.

One other set of post-election personnel changes at OPM, although legal, is ill-designed if the Reagan Administration wants responsible political direction of the federal service, under law, as we do. Appointments of five new political officials, called Director's Field Representatives, were announced on November 3, each with responsibilities in two regions for Federal Executive Board, combined federal campaign, and "a variety of other responsibilities in the field." The career regional directors will continue with line responsibility.

That arrangement is best suited to produce confusion of responsibility both in the field and in reporting relationships to OPM headquarters, not to clarify channels for administration of authoritative policy. It is inconsistent with the organizational clarity required for needed legal accountability, which is basic to the American system of political responsibility.

Senator SARBANES. Thus you have had an entry of politics through example, and example is very important, whereas here, you have the top people in the OPM, the very people that are charged with administering a nonpolitical civil service, running around the country engaged in politics in a most blatantly partisan way. I don't think it should happen and I would take the same position if the parties and the individuals were reversed.

This is a matter beyond party. It really goes to fundamentals about our Government and how it's going to function and the nature of the services that Government employees are going to provide to the American people. Not everything is political in a partisan way and the civil service ought not to be turned into a partisan, political activity. We've operated on that principle for 100 years with the Civil Service Commission in a way that's been accepted by both parties and has redounded to the benefit of the Nation. Mr. Devine now is subverting that principle and I submit subverting the integrity of the civil service.

In addition, there has been an incredible increase in the number of Schedule C appointments. Governmentwide they have doubled under Mr. Devine's tenure, counting OPM and White House control.

Senator EAGLETON. What are Schedule C appointments?

Those are appointments made on a political basis, and that's a part of our system and I don't question the appropriateness of some Schedule C appointments. We've had that system traditionally but there has been a doubling, a doubling of the Schedule C appointments controlled by OPM and the White House during this period. There has been a doubling of OPM employees listed in the plum book positions available on a political basis.

There is a growing apprehension in the civil service ranks that the performance appraisal system which Mr. Devine has pushed so hard will be used for ideological purposes. A good job performance involves carrying out one's duties in conformity with the law. The difficulties at the EPA are an example of what happens if that obligation is ignored. Congress has a role in defining agency goals and it is not simply a matter of political definition by agency managers.

To take one other example, Dr. Devine has appointed five regional representatives to oversee the activities of the regional directors. Those individuals now are known within the Federal service as the "thought police."

Mr. Chairman, the first major point is the insertion of politics in a highly partisan way into the operation of the civil service. I ask you to imagine the Director of OPM coming into your State and saying just to paraphrase, "Senators are like snowflakes. One or two don't make a difference but a lot of bad ones are a problem. Unfortunately you've got one here." Obviously as politicians we can deal with the politics of this; we get far worse than that from our political opponents. The question here is whether the Director of OPM, given his responsibilities, given the nature of his position, ought to be engaged in that kind of activity. I submit he should not.

Second, I want to turn to Devine's repeated confrontation with Federal employees. I submit to you that any personnel director in a private firm who engaged in such a continuous saga of hostility and antagonism towards the employees of the firm would no longer be its personnel director.

During his tenure there has been a constant assault on the Federal employees over and above the substance of the issue involved. It has been reflected by the excessive rhetoric, by the far-reaching proposals, by the misrepresentation of their impact in areas such as RIF's, health benefit reductions, cancelling open season, pay cuts, retirement changes, contracting out, the closing of hiring categories, the widespread use of temporaries, the disregard of pay comparability, the opposition of flex time, and on and on and on.

The vehemence and inaccuracies with which that assault has been conducted have undermined the credibility of the Director of OPM in dealing with his own people—the Federal work force. We've had a blizzard of press releases, issuing from the Director's office, so extensive that Members of the Senate called for an examination as to the prohibitions against lobbying by political appointees with taxpayers' dollars.

More importantly, what has happened is that even if some of the proposals made sense, and in my judgment few of them do, no competent manager would propose them with such callous indifference to the work force which they will affect. There has been an absolute lack of professionalism and the morale in the Federal service has been deeply and markedly affected and the nation has suffered because of the loss of productivity.

Let me turn finally to Dr. Devine and confrontations with the Congress.

Obviously, an important part of being the Director of OPM is to have a working relationship with the Congress. The Congress is involved in setting policy. The Congress makes the laws which the agencies are required to abide by. In fact, employees of the agencies are under a responsibility to abide by the statutory requirements contained in legislation enacted by the Congress.

I noted earlier the Devine involvement in partisan political activity against specific Members of Congress, contrary to all previous tradition with respect to the conduct of the heads of the civil service.

Second, there is a constant barrage of assaults on Congress in the most blatant, political fashion, reflecting a total absence of professionalism. Devine has said, "Congress is our biggest management problem and we have to make some changes if we want it to work." And again, "All these things I've done by administrative action because I've done it too quickly for Congress to know what I was doing." How is that for comity between the two branches of Government or for establishing a cooperative relationship that enables us to confront and work out some of the very difficult problems which we confront? There are difficult and complex problems in this area which need to be addressed and in fact this committee has been trying to do just that.

Mr. Chairman, we've been through, as you well know since you were in the middle of it, the whole difficulty with Devine over the regulations with respect to performance, pay and job security. Let me retrace that story briefly because it reflects in Devine's dealing with the Congress the same confrontational approach reflected in dealing with the Federal employees.

On March 30, 1983, Dr. Devine put forward regulations in this area which created a congressional furor as we will recall. Prohibitions against applying the regulations were attached to legislation moving through the Congress. In light of that action, implementation of the regulations was delayed. On July 14 the second set of regulations was promulgated; again the Congress delayed them until October 15 by statute. On October 25 a third set was promulgated. There was language in the continuing resolution enacted at that time which delayed them as well. The day after the Congress went out of session having attached that rider to the continuing resolution providing that these regulations were to be delayed, Devine held a press conference—this was just after Congress had adjourned—saying that only OPM was barred from implementing the regulations but that the other departments and agencies could proceed to do so and should proceed to do so.

Now, talk about trying to thwart the will of the Congress as reflected in law. This is a clear and classic example. He was taken to court, his contention was rejected by the District Court. Not prepared to accept that decision, he took it on appeal to the Court of Appeals and again his position was rejected by the Appeals Court and it was found that the regulations should not take effect.

Mr. Chairman, I submit to the committee that this is not a record of a nominee who deserves reconfirmation. Clearly it is an important requirement that the Director of OPM be able to develop a positive and constructive working relationship with the Congress. Devine has not done that, his approach has been confrontational, his approach has been one that has not respected leglislation enacted by the Congress.

Second, clearly it's essential that the Director be able to establish a positive relationship with the Federal employees—both with the individual employees and with the organizations which represent them. It has proved impossible to work out reasonable solutions to some of the problems because of Devine's confrontational tactics. That's the record you're being asked to pass on now in this reconfirmation.

Finally, to go back to the first point, and the most pressing one of all, and that is the blatant introduction of politics into the civil service. There is an effort underway to put politics right into the fabric of the civil service. It was clearly not intended that the Director of OPM and high officials in that office should be running around the country engaged in partisan, political activities.

When we replaced the bipartisan Civil Service Commission with a Director it was not intended that he should undertake this sort of role. I think that is clear in the report, and I think Devine has really broken his trust with the civil service employees and that the integrity of the civil service system is under attack. For those reasons, Mr. Chairman, I urge this committee to go into his record carefully and thoroughly. I do not believe that this nominee should be reconfirmed for this important position.

Senator **Stevens**. Senator, if someone comes up my way and starts talking about snowflakes, no one would pay much attention to him. [Laughter.]

But let me tell you that, unfortunately, sitting in this chair as chairman today is ironic, because Senator Mathias and I warned in 1978, as has been pointed out already, that the reforms, in fact, would scrap the protections of the Civil Service Commission and that the new appointee would, in fact, be in the political sphere and not in a merit protection sphere, and when we established the Merit Systems Protection Board, that was a wholly different direction.

As a matter of fact, I am informed that the general counsel of the Merit Systems Protection Board, in response to a protest filed by Congresswoman Schroeder, ruled that Mr. Devine was not covered by the Hatch Act; that his conduct, in terms of the campaign, was consistent with the law; and that he is the head of an agency that is confirmed by the Congress and as such, is specifically exempted from the Hatch Act.

Senator Mathias and I warned about that. Mrs. Schroeder and others were involved at that time. You will recall some of the discussions we had at length in conference committee concerning that fact.

We warned against the politicization of the whole civil service process. But the Congress passed the law. I think Dr. Devine has done nothing more than the current law permits him to do. The question of whether that should be the law is another matter, and I opposed that law, as you know.

Senator **Sarbanes**. Mr. Chairman, could I respond to that?

I am not asserting that he violated the Hatch Act, because I think he has. At least with respect to the example you used, there are some other, more difficult questions I hope the committee will go into.

First of all, I agree with Senator Eagleton when he admired the foresight that you and Senator Mathias had at the time. I submit to you, though, that when the Congress did that, they were focusing on making the Director, as it were, more of an instrument of the President's personnel management and not on the proposition that the Director was then going to embark on a whole sequence of being a political hitman around the country.

I mean, that was the furthest thing, I submit to you, from the minds of the Congress, that this abuse would, in fact, happen.

Now you can argue, well, it's legally possible—but it completely flies in the face of the spirit of the civil service law and of the requirements in terms of having an effective, able, responsible civil service. You are passing, now, on the way this person has conducted himself in office. I don't think it is enough to simply look to see whether he has committed a technical violation of the law.

There is the broader question of how has he carried out the office? How has he conducted himself? What sort of an example has he set? What principles or views is it that he stresses through his own activities? How is he able to work on the very important questions of his relationship with his employees and his relationship with the Congress? That is what the purpose of this hearing is, to evaluate that performance of Devine, and I submit to you that he has crossed the lines of acceptability.

Senator STEVENS. This is not the time or place to debate that, Senator. I can merely say to you that if you want to introduce legislation that reinstates the Civil Service Commission, I would be the first to support it. But we don't have a Commission; we have a single head of an agency, and the tradition is that those people are—in fact, it is not a tradition, it is the law—they are exempt from the Hatch Act. As such, he has the right to pursue political activities if he wishes to do so.

Senator SARBANES. Yes, but there is no tradition. The tradition is going to be established right here. This is the precedent. Scott Campbell took the position under this law as the first Director, and eschewed political activity. I think that was the congressional intent and expectation when they changed the law, that that is how this job was going to be conducted.

So he took it over and——

Senator STEVENS. Then Congress should have said it when Senator Mathias and I asked them to do it, but they did not. There is nothing that prevents a head of this agency from being involved in the political spectrum, and we warned about that time and time again.

Senator EAGLETON. Except good taste and good judgment.

Senator STEVENS. We don't legislate that.

Senator EAGLETON. Good taste and good judgment are relevant.

Senator STEVENS. It is like senatorial courtesy, old friend. We don't legislate that.

Senator SARBANES. You have a chance to do that here on the basis of this reconfirmation. I am submitting Devine conducted the job in a way that no one anticipated or expected, was totally contrary with past history and directly contrary to the way it was conducted by the first holder of the directorship when the law was changed.

Now, it seems to me the committee has got to come to grips with that. I submit to you if the conclusion out of all of this is that Devine and those around him can, in effect, be on the partisan campaign trail day in and day out, that you have taken an incredibly long step toward destroying the integrity of the civil service.

Senator STEVENS. I thank him for doing it. It may make the Congress enact a law the way I wanted it in the first place.

Senator?

Senator EAGLETON. No questions.

Senator STEVENS. Senator Gore?

Senator EAGLETON. Senator Gore has no questions.

Senator STEVENS. Thank you very much.

Senator SARBANES. Thank you.

Senator LEVIN. Mr. Chairman, we may have a question of Senator Sarbanes for the record. I know he will be happy to answer them.

Senator STEVENS. For the record?

Senator **Levin**. We may.

Senator **Stevens**. We should consult with the other members on this point. I will let you know later when the hearing record will close.

Good morning.

Representative **Schroeder**. Good morning.

Senator **Stevens**. Pat, nice to see you here. Do you have a time-frame problem? We have been sort of lax in opening this session.

Representative **Schroeder**. No, that is fine. I will be happy to stay as long as you need me to be here.

Senator **Stevens**. We are happy to have you here.

TESTIMONY OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Representative **Schroeder**. Let me first of all ask unanimous consent to put my long statement in the record and then let me summarize a bit, because having listened to the prior testimony, some of this is going over the same ground. So I will put my entire statement in the record and then try to briefly hit some points I think really need to be brought up.

I think all of you are aware of what is going on. You have heard much reference to what the civil service should be about and what the long 100-year history has been, what the precedent has been. I think it is important to remember, too, if you look at it internationally, countries that have really gotten ahead have done terrifically with their civil service. Other countries who have not made it have had a real corrupt civil service. Thank goodness for the British model, which is the one that we had planned to go along with. I think if you look at Singapore and countries like that, you say, "Why in the world did they make it ahead?" Lee Kuan Yew will tell you he gathered the best and brightest around him and really made that government work.

When we looked at the Civil Service Reform Act of 1978, about which much has been said, there were many things that some of us liked and some of us did not like. But what we were talking about doing was trying to make the civil service more like the private sector, more competitive, and trying to make it more like the private sector, more on the Singapore model, I suppose. No one had any intention of doing away with the old nonpartisan civil service tradition that has grown up in this country for 100 years. Why? Because I think everyone in this room knows that there is no Republican or Democratic way to go to the Moon and there is no Republican or Democratic way to fight drugs. There is no Republican or Democratic way to run the FBI, and so forth and so on, and we certainly didn't want to politicize those agencies at all.

We wanted to find ways to make them more efficient to run, but in the merit system civil service nonpartisan manner that had come down and served this country well. It was scraping off some barnacles and giving some more flexibility so this country could be more competitive.

I honestly realize that it is your and not the House's decision as to whether or not to confirm Dr. Devine. But I think the things that you should look at very clearly are whether, in the last 4 years, he faithfully executed the laws; whether or not he motivated civil service employees; whether or not he worked efficiently within the political system; and whether or not there were safeguards to the merit system, which I think every Member of Congress and the Senate intended to keep.

I must say that based on those four things, I have to say he has not lived up to them, but my full statement gives many more detailed reasons because of my chairmanship of the Civil Service Subcommittee over in the House.

But let me just hit a few of these things. No. 1, faithfully executing the law. I mean executing in carrying it out, I don't mean it in the light of killing it. And I think that if you look at his tenure, he has tended to treat it, at best, as an advisory, but never seemed to feel at all bound by whatever the law was.

He clearly bashed the health benefit program. We know how that all transpired. He has never been able to develop a new selection device to replace the PACE examination that we used to give everybody on merit, even though there is a court order mandating that that be done; he opposed the SES RIF rules that we, in Congress, wrote and put in the 1981 reconciliation law, and as a consequence, OPM has done a very dismal job in trying to place any surplus senior executives.

GAO has just recently told us how the whole OPM flexitime study was skewed so that it would come out with negative results. Well, even with that skewed study the GAO uncovered, we ended up with positive results anyway.

But the examples go on and on and on, and, again, I have got much more details in the prepared statement. But when you say, was the law faithfully executed? No. And I think we have heard other statements from prior witnesses, so I won't go through it all, but there seems to be a real impatience, like, "Who do these Congresspeople think they are? I don't have to pay much attention to it," and treating it really as an advisory opinion.

No. 2, motivating civil servants. My whole background has been in public employment, and I know what the defense is. The defense of people like probably Senator Helms and Dr. Devine will say, "Well, you are a coddler of these people." Absolutely not. I am saying that the way we have to have things done by the Government and if we want them done efficiently and if we want them done productively, which I assume we all do, then we clearly know motivation is a key component of that. We will not have an efficient, productive Government unless we have motivation.

And we also know that there is no way totally to do away with Government. There are very many things that have to be done, so we make it a self-fulfilling prophecy if we say Government is no good and the people who work for Government are no good, and we bash them every time we get a chance, and suddenly anyone who is decent does leave and the whole motivation goes down the drain. I think on employee morale, I don't even need to go much further than this. I think the White House has recognized how serious the morale problem is. It really has sunk to record lows.

To turn this all around, as you know, the White House has set up an employee morale task force. It is very interesting that Dr. Devine does not serve on it. You would think that the person who is heading up the Office of Personnel Management would be the first to serve on it, but he is not.

I think one of the things that has undercut employee morale the most is so many of Dr. Devine's attacks have been based on wrong facts. We all have evidence of those on retirement, pay levels, quit rates, the grade bulge, and so forth and so on. OPM has presented erroneous numbers, and then everyone in the Congress has been able to point that out.

Let me go on to No. 3, working efficiently within the political process.

Again, I don't think you do that by Democrat bashing, by being highly partisan, by even bashing the institutions. It is not just political. I think the institutions are something. If you sat down and said, "What legislative achievements has this nominee achieved?" I don't know what they would be. They would be very minimal.

It has been much more of a confrontational type thing. Now, I would be the last to criticize political styles. Confrontational style is certainly one way to go, but not if you never got anywhere with it. I think when you look at what has transpired and what the legislative record has been and what he has positively produced, I just don't see anything that really merits continuing on.

The last thing, again, I think, is the safeguarding of the merit system. This Government can never pay adequately the bright minds that we need to run it, and in this competitive planet that we live on, we need brighter people. Let's face it, it gets tougher and tougher to run these awful things. What is America's trade policy? What is America's budget going to be? All those types of things take very, very savvy people, and we have always known that we could never pay them adequately, but we had to hope for that wonderful feeling of Government service that has come down. We have counted on people willing to take a cut in pay but still willing and able to do it. You can't do that without a merit system. They are not going to take a cut in pay and also be told to tap dance to a certain political tune or they won't progress.

The taxpayers don't want that. They want efficiency, and they want productivity. Unfortunately, we are seeing more and more of politics rather than performance being used for numerous reorganizations, promotions, and so forth. The increased politicization of the work force is something that everybody has talked about. Even OPM itself has gone from 12 political appointees under the Carter administration to, my office says, 34 political appointees.

Some people say there are as many as 48. But no matter what, that is a phenomenal increase, and how do you have political ways of running administration? You really shouldn't. There are a few political slots because there are some political issues, but basically, the merit system should be above politics. The nominee has clearly moved many more jobs into the political column.

If any of us ran our offices in the manner that the Personnel Office is being run, I would question what kind of work we would have out of our employees. The same with the private sector. If the Senators went around saying, "You wouldn't believe what a bunch of lazy people I have working for me. They are overpaid, they are underworked, they can't make good decisions," I doubt that they would be productive and really be interested in trying to help Senators or Congresspeople move ahead. It is the same at OPM.

If the president of General Motors went around saying, "You wouldn't believe what a bunch of dummies I have making cars," people would not go out and buy his cars. They would look for somebody else with good people building the cars because you figure they would be better cars.

I think that on all four levels, the nominee has just not built a record that deserves reconfirmation, but I realize that that is your decision and not mine.

Again, he has not committed a felony. If that is the issue, he has not done anything that is criminally wrong. But I certainly think that for running this very key position—and clearly, we thought it was a very key position or we would not have had the 4-year term, we would have treated it like every other Cabinet appointment—I really hope that you look intently, and I know you will, at the entire record and look at those things, of how the job is run. I thank you very much for allowing me to be here.

Senator STEVENS. Thank you very much. Your full statement will appear in the record.

Representative SCHROEDER. I appreciate that.

Senator STEVENS. Senator Eagleton?

Senator EAGLETON. Just a couple of brief questions.

Mrs. Schroeder, is it not true that there are two Republican Congresswomen in the State of Maryland, Marjorie Holt and Helen Bentley?

Representative SCHROEDER. Yes, there are.

Senator EAGLETON. Would you note it as unusual that neither or both of these Republican congressional folks from Mr. Devine's home State were here to introduce him this morning?

Representative SCHROEDER. Well, maybe he didn't want to be political, Senator. [Laughter.]

It would be new, but maybe after 4 years——

Senator EAGLETON. It would be the first time in his life.

Representative SCHROEDER. Yes; that is right. Maybe they realize there is a problem.

Senator EAGLETON. Yet the person that he called upon to introduce him was the Senator from North Carolina, where he campaigned in multiple appearances, Mr. Devine did, and the Senator from North Carolina didn't know whether he was there or not. Now you see him, now you don't; sort of a magic act.

You need not comment on that. I yield to my colleagues.

Representative SCHROEDER. I would just say that I think I would have remembered if some of those people had come in to campaign for me or against me, either way.

Senator EAGLETON. I think 534 Members of Congress, that is 100 Senators or 99 Senators and 435 House Members would remember whether the Director of OPM or the Secretary of State or the Secretary of Defense or the Attorney General had campaigned in his or her State in the most recent election. We weren't inquiring back to 1904. We were inquiring back just a few months ago to November 1984.

Representative SCHROEDER. I agree.

Senator STEVENS. Senator Gore.

Senator **Gore**. Mr. Chairman, because I had the great pleasure of serving with Congresswoman Schroeder for 8 years, I was going to say a lot of nice words about her, but I know that you and this committee have had the chance to work with her in her capacity as the counterpart on the House side, and you already know of her competence and the weight which we should give to her recommendations and her testimony this morning. It is just a pleasure to have you here, and I really have no questions, Mr. Chairman.

Representative **Schroeder**. Thank you. We congratulate you on your promotion. It is nice to see you here.

Senator **Stevens**. Senator Levin.

Senator **Levin**. No questions, Mr. Chairman.

Senator **Stevens**. Thank you very much.

Representative **Schroeder**. Thank you very much.

[Congresswoman Schroeder's prepared statement follows:]

Statement of Rep. Patricia Schroeder
Chairwoman, Subcommittee on Civil Service
Committee on Post Office and Civil Service
U.S. House of Representatives
On Nomination of Dr. Donald J. Devine
As Director of Office of Personnel Management
Before Committee on Governmental Affairs
United States Senate
April 1, 1985

Mr. Chairman and Senators:

I am pleased that you have allowed me to testify before you today. I come neither to support nor to oppose the nomination of Dr. Devine. That is a decision for this Committee and the Senate to make.

My recommendation is that, if this Committee decides to favorably report the nomination, it should do so only after extracting a commitment from the nominee to discharge his responsibilities consistent with four basic principles. The four principles are:

I. Faithfully execute the law.

II. Motivate civil servants.

III. Work effectively within the political process.

IV. Safeguard the merit personnel system.

In his four year term which just expired, the nominee has frequently failed to live up to these principles. His failure to do so has undermined the public service. Let me explain:

I. Faithfully Execute the Law

The first and preeminent obligation of every public official is to faithfully execute the laws, whether or not he agrees with them. Unfortunately, the nominee has often treated the law as advisory.

Perhaps the most notorious failure to execute the law effectively came early in the nominee's term when he acted unilaterally to force renegotiation of a huge number of Federal Employee Health Benefit Program contracts, resulting in a substantial increase in cost to employees and substantial reductions in benefits. The Director turned an ongoing problem with underfunding due to soaring medical inflation into a crisis which redounded to the detriment of Federal workers and retirees. He did not violate the law, but he handled a problem in a particularly crude and counterproductive manner.

A second example relates to the failure of the Office of Personnel Management (OPM) to develop an examination to replace the Professional and Administrative Career Examination (PACE), as required by the consent decree in Luevano v. Devine. Instead, OPM has established a hokey non-competitive appointing authority and has rejected efforts to permit appointees under this authority to convert to career appointments. Also, OPM has ceased collecting race and ethnicity data on applicants, so that the adverse impact of selection procedures can no longer be easily measured.

A third example is OPM's dismal record in implementing the placement program for career senior executives who are subject to Reductions in Force (RIFs). In the 1981 Budget Reconciliation Act, my committee worked with this Committee in devising a method to retain the best managers in government. OPM never liked the law and did a sorry job of administering it. Virtually no career executives have been placed under this program. Those who got other SES jobs, got them on their own.

A related example has to do with the outplacement programs for RIFed employees. Chairman Ford and others wrote to the nominee in 1981 urging him to set up a program to place surplus domestic agency employees in Defense Department jobs to reduce the dislocation caused by a reduction in the size of government. OPM failed to act on this proposal.

Fifth, OPM, under the nominee, has abandoned the minority recruitment program established by the Garcia amendment to the Civil Service Reform Act of 1978. This dropping of affirmative employment requirements has shown up in a substantial slowing of the growth of minorities and women in the workforce.

Sixth, the 1982 act extending the flexible and compressed work schedule program instructed OPM to review flexitime programs to see how they work. Instead, OPM produced a seriously flawed and slanted report a few weeks ago. Despite a clear effort by OPM to tilt the survey against flexitime, the results were positive.

Seventh, a report of the Subcommittee on Civil Service (Committee Print 98-8) documents how the nominee misused his authority to try to force Planned Parenthood out of the Combined Federal Campaign.

Eighth, during the first two years of the nominee's tenure, OPM failed to appear at the Merit Systems Protection Board to contest disability decisions. This led to a large number of awards to individuals against the government by default. This management failure cost the government substantial sums.

Finally, the fourth section of the regulatory package of

March 30, 1983, purported to instruct agencies on their responsibilities under the labor-management sections of the Civil Service Reform Act of 1978. This document seriously misstated the law and arrogated to OPM functions which were assigned by statute to the Federal Labor Relations Authority.

These examples do not constitute impeachable or indictable offenses. They do show serious deficiencies in the ability or inclination of the nominee to faithfully execute the laws.

II. Motivate Civil Servants

The nominee has not just failed to motivate civil servants; he has done numerous things to demoralize the workforce. Indeed, morale problems have gotten so bad that the White House has established a special task force just to deal with the issue. And, the task force is run by White House people, not by the individual charged by law with overseeing the civil service.

Federal workers expect that the Director of OPM will, at least, reflect their needs and interests in the policy-setting meetings of government. In fact, the perception is that the nominee is the individual most hostile to their interests in government. This perception is not surprising considering the fact that the nominee uses every available opportunity to claim that the retirement system is too generous and that pay is too high.

Frankly, those of us who support public servants and are loathe to change the retirement system should be forced to respond to allegations that the civil service retirement system is out of line because annuities are fully indexed to inflation and because employees can retire at age 55 with 30 years of service and not have their annuity reduced. The nominee has, through misleading statements (such as his press release overstating the amount the system pays out each year by $13 billion), scare tactics (like talking about a half a trillion dollar unfunded liability when OPM's own figures show the trust fund growing each year for the next 70), and invidious comparisons (such as his press release saying civil service retirement costs more than welfare), let us off the hook. We can respond to the nominee's proposals by pointing out that his facts and assumptions are wrong. The nominee provides a too fetching target. Because of this, we never seem to get aroung to a serious and responsible debate over the appropriate retirement system.

Similarly, the nominee's claim that the government has a lower quit rate than private industry and therefore the government pays too much is both inaccurate and destructive of morale. On pay, retirement, and health benefits, the nominee has sounded the note that Federal workers are overpaid. It is hard to imagine anything more demotivating to the workforce.

The nominee has also postulated a bulge of GS-11s through GS-15s, based on the most specious evidence. Finally, I understand, the Administration has back away from the counterproductive means designed by the nominee to correct this alleged problem.

The nominee has raised further concerns by suggesting ways to reduce the calculation of appropriate pay under the Pay

Comparability Act. Wiser heads in the Administration prevailed and the nominee was not allowed to make the changes unilaterally.

Yet, it is not just these incessant attacks on their pay and benefits which dishearten civil servants. The nominee has done a variety of other things that weaken morale:

-- OPM released highly selective results from the Federal Employee Attitude Survey, purporting to show good morale. Even the scantly material released showed that this conclusion was in error. The complete results of the survey, which were due out in September 1984, have still not been released.

-- At OPM, careerists are excluded from policy meetings. Instead a small group of political appointees, all devoid of experience in government personnel management, meet to decide policy. Further, civil servants have been instructed not to talk to the press or Congress.

-- The nominee sent a proposal to the Office of Management and Budget (OMB) in 1981 to close the prestigious Federal Executive Institute. This effort was shot down by OMB.

-- The nominee hired as his policy chief at OPM Mike Sanera, who now runs a training program at the Heritage Foundation. This training program was recently made eligible for government funds under the Government Employees Training Act. Mr. Sanera has written about, and the course seems to teach, a style of management which involves keeping the career service in the dark about policy initiatives. This scorched earth style of management is destructive in the Federal service.

-- OPM has cut back on service to employees and retirees in regional and field offices.

-- OPM issued a set of poorly thought out regulations on March 30, 1983, dealing with performance management and reductions in force. These regulations were presented as a way to reduce benefits to civil servants and to penalize them.

-- The nominee has made it his personal cause to seek the downgrading of certain groups of employees. One group, retirement claims examiners at OPM, were downgraded after I wrote arguing that claims examiners doing similar work at the State Department ought to be upgraded to the same level as those at OPM.

-- The nominee has opposed or nitpicked the flexible and compressed work schedule program each time it has come up for reauthorization. This program may be the single most successful personnel management initiative in the past decade.

These, and numerous other actions, large and small, have reminded civil servants time and time again that the Director of the Office of Personnel Management is against them and working to undermine their interests. To most civil servants, working hard and trying to do a good job for the taxpayer, this opposition is just plain depressing. Imagine how your staff would feel if you gave speeches saying they were overcompensated, if you deprived them of information and cut them out of the decision process, and if you sought out ways to make their lives unpleasant. This is exactly what has been happening in the Federal government.

III. Work Effectively Within Political Process

The nominee's record of accomplishment is minute. From my point of view, this is not an argument against his confirmation. Indeed, a Director of the Office of Personnel Management who was willing to work with Congress and other executive branch officials might be successful in devaluing the retirement system. Over the last four years, Congress has shown extraordinary concern about the deficit. As the same time, the nominee has spoken out for cuts in the retirement system. The fact that he has been unable to achieve any major structural change in the retirement system may be the strongest evidence of his inability to work effectively within the political process.

My colleagues and I on the House Committee on Post Office and Civil Service have stated our willingness, on numerous occasions, to sit down with the nominee and work out legislative solutions to problems. He has never accepted our invitation. Instead, he has issued press releases attacking the House Committee and the Democratic Party for blocking his changes. This response has now poisoned the waters. The nominee has acted in a confrontational way on pay and retirement, and on other issues as well. On issues like the March 30, 1983, regulations and pay equity studies, the nominee has acted in the same way. His conduct suggests that he is more interested in gaining political points than in making changes which he says are important.

As I mentioned before, the nominee has provided inaccurate and misleading information to Congress on the retirement system. When he publicly misstates facts, it is destructive to morale. When he does the same thing to congressional committees, he undermines the democratic system. Without accurate and full information from agencies of government, congressional committees cannot do their job. Further, the nominee has, on many occasions, failed to supply requested information to the House Committee.

On the issue of pay equity, the nominee commissioned a political appointee named James Byrnes to write a memorandum suggesting a contrived pay equity study to embarrass Democrats.

The nominee has refused to negotiate changes in the March 30, 1983, regulations. As a result, implementation of those regulations has been blocked by Appropriations riders for two years.

And, the nominee has prevented employees of OPM from answering the inquiries of congressional committees. He has made sure that political appointees decide how to answer each request.

The nominee has not only shown contempt for the Congress, he has also shown an inability to work within the Executive Branch. I have talked about the morale task force. Let me give a few more examples.

In National Security Decision Directive 84, the President ordered an interagency task force, led by the Justice Department, to update the rules concerning personnel security. The nominee did not like where this task force was heading. So, in January 1984, he issued Basic Installment 311 to the Federal Personnel Manual. The Defense Department said these requirements would cost $400 million a year to implement and succeeded in getting an amendment to the Defense authorization legislation excusing the Department from having to follow the OPM regulation.

A prominent senior executive at one large agency wrote a letter to the Washington Post. The nominee did not like what the letter said. He called the Cabinet Secretary to recommend that the senior executive be fired. The Cabinet Secretary told the nominee to get lost. In the same vein, a number of agency heads have reported to me that the nominee has threatened to reduce the agency's SES allocation unless the agency supported the nominee on certain issues within the Administration.

I believe that political competence, both within the Administration and with Congress, is a prerequisite for an agency head. The last four years have made me wonder whether the nominee has the necessary level of political competence.

IV. Safeguard the Merit System

The merit system principles contained in 5 U.S.C. 2301 are the bedrock of the civil service system. These principles are based on free, open and competitive selection for positions and fair and equitable treatment for employees, without political litmus tests being imposed on the career staff. Essentially, the merit system principles are supposed to ensure an independent, skilled, and non-partisan public service. While the foregoing three principles apply with equal force to all agency heads, this principle applies with especial force to the Director of the Office of Personnel Management.

OPM, under the nominee, seems to have lost sight of the merit system principles. In January of this year, a new Federal Personnel Manual issuance encouraged the use of temporary employees and expanded the use of temporary hiring authority to higher grades and for longer periods. The Denver Regional Office of OPM told us that between 4 and 6 percent of temporary appointees are hired competitively. Broader use of temporary employees will surely result in a weaker merit system. OPM has issued no oversight requirement over temporary employees to its compliance staff.

The methodology the compliance staff uses to review whether agencies follow the personnel rules was changed in 1983 to save money. In the past, two or three evaluators would spend two weeks at an installation reviewing files and making sure that jobs were not overgraded. Now, one or two evaluators will spend one day. The agency will fill out an extensive questionnaire beforehand. The result is cheaper compliance reviews. Agencies, if they desire, have the ability now to prevent OPM from finding deficiencies.

And, in some cases, this compliance function has been subverted for political reasons. When a large number of senior executives were RIFed from the Department of Energy because they were associated with the Carter Administration energy conservation program, the compliance review found only minor technical violations and failed to catch the overall political nature of the RIF.

In OPM itself, there have been countless reorganizations and reassignments of senior executives. Executives who were enthusiastic about the programs of the previous administration, such as the productivity program, were transferred to non-jobs. Many have left. The man who was universally recognized as the government expert on the Federal labor-management relations program was transferred to an area about which he knew little. While he has done well in the new area, the labor-management relations area has suffered substantial damage.

As this committee knows, the number of political appointees, both at OPM and throughout the government, has skyrocketed under this Administration. While I do not have a problem with an Administration having trusted people around to do key jobs, I do have a problem with the political bulge of this Administration and the fact that careerists are being frozen out of policy. For OPM, compare the Plum Books of 1980 and 1984. In 1980, there were 5 noncareer senior executives. In 1984, there were 11, an increase of 120%. In 1980, there were 7 Schedule C appointees. In 1984, there were 23 Schedule C's, or a 229% increase. There are nearly three times as many political appointees at OPM today as there were when the nominee took office. This has happened while the total employment at OPM dropped from 6400 to 5700, or 11%.

This is not just an issue of numbers. OPM, and its predecessor, the Civil Service Commission, have historically been career service organizations, to ensure the integrity of the merit system. This is no longer true. And key positions, like the head of the career Senior Executive Service (SES) government-wide, have gone to individuals whose main managerial experience has come in political campaigns. I find this change unacceptable.

Indeed, the man appointed to head the SES left in 1982 to manage Lawrence Hogan's unsuccessful campaign for the United States Senate. A few days after the election, he came back to his old position, which had been held for him. This seems to be a pretty clear Hatch Act violation.

Politics has not just crept into the personnel system. The nominee has used his power to elect Republicans and defeat Democrats. While the Hatch Act does not prevent him from doing so, I think this sort of conduct is inappropriate for the custodian of the merit system. Further, he has used employees, subject to the Hatch Act, to set up political appearances.

The nominee wrote to the Democratic governors of three states in 1984 threatening them with cut-offs of Federal funds for running voter registration drives. In hearings before a House committee, it was conclusively demonstrated that there was absolutely no basis for his charge.

I have spotlighted a few acts of the nominee which raise questions in my mind about his ability to do the job. I can provide details on each matter raised and on numerous other ones as well, if the Committee should desire.

The Committee has a serious responsibility in deciding whether to recommend the confirmation of the nominee. I do not believe that the fact that we disagree with him on certain issues should disqualify him for reappointment. However, over the last four years, he has not demonstrated that he meets the four principles which I believe are essential for the Director of OPM. If you do decide to confirm him, I hope you will gain his commitment to change his style of operation.

Senator **Stevens**. Our next witness is Mr. Devine.

Senator **Eagleton**. I ask that he be sworn, Mr. Chairman.

Senator **Stevens**. Mr. Devine, the committee rules require that nominees at nomination hearings give their testimony under oath. So in conformity with that, you must give your testimony under oath.

Would you please raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Devine**. I do.

Senator **Stevens**. Thank you very much.

This is an important hearing in your career. I believe you should read your testimony rather than put it in the record. We are pleased to have your statement.

Mr. **Devine**. Thank you very much, Senator. I will be happy to read the statement, if you wish, but it will be available for the record; so please, I would like to proceed in a little different way.

Senator **Stevens**. It is your hearing. I only say that because many times the statement of the witness sets forth the answers to the questions that are at a later time raised. So you proceed as you wish.

TESTIMONY OF DONALD J. DEVINE, DIRECTOR-DESIGNATE, OFFICE OF PERSONNEL MANAGEMENT

Mr. **Devine**. Thank you very much. I am approaching nomination for Director of the Office of Personnel Management. That deals with management; but most of all it deals with people. I think that it would better set the parameters of this nomination if I dealt with it in terms of the people important to this position. You get a good deal of criticism in this job, but those who are familiar with me know that I have a pretty tough hide; and I don't really mind that. But there really is a group of people who disproportionately bear the burden of my position. And I am kind of sorry, really, that I asked them to come here today, in some ways, because I know they don't like it when criticism gets personal rather than on policy, which honest people can disagree with.

But I would like to introduce them to the committee. I did last time, and I would ask if they wouldn't mind standing for a minute.

[People stood up.]

Mr. **Devine**. I would like you to know my long-suffering wife, Ann.

Senator **Eagleton**. Which one is she? [Laughter.]

Mr. **Devine**. She appreciates that comment. [Laughter.] And my oldest son, William, Bill. He's a salesman in the Washington area and must sell his wares to a lot of Federal employees, so he has had to bear a good part of this burden, too.

My son, Michael, as you can see, is serving his country in the Navy. He comes in contact with a lot of civilian employees of the Navy. My daughter, Patricia, really, is my strongest fighter. Her red hair shows that. And my son, Joseph, who actually had an examination today. We thought we could get him back to New York in time. But instead, I took kind of a tough beating in the opening, and he wanted to at least see me answer those charges before he left; and he just canceled his examination. So I know it is tough for you, and I appreciate it, and I would like to say it in public.

Thank you.

Senator **Stevens**. We thank you for coming to be with your father. I think all of us realize how much families are involved in these public jobs, and I think it is very, very fine of you to come and give him moral support. Don't worry about him. He is tough, as he says.

Go ahead, proceed, please.

Mr. **Devine**. There is a second group of people that I would like to recognize: The fine public servants that I have served with at the Office of Personnel Management and in our coordination role at the agencies—over the past 4 years. As I have stressed many times, we have a superior caliber of people in the Government, and especially at OPM. And just to show that we have a good number of people who are concerned about this, I would like to ask the OPM and other staff to stand up for a minute, too, if they wouldn't mind.

[Large group stood up.]

Mr. **Devine**. I would like to publicly thank them and the Members of OPM and those around me.

Senator **Eagleton**. Who is running the store, Mr. Chairman? [Laughter.]

Mr. **Devine**. And, third, I would like to mention the Members of Congress, with whom, contrary to some of the testimony so far, I have had excellent relations, at least in private.

I know Senator Stevens has had to put up with me these past 4 years. It hasn't always been easy. He has presented his point of view and in a very forceful way; but he has always been eminently fair. I would also like to thank my friends in the Senate, Senator Abdnor, Senator Hatch, Senator Helms, Senator Quayle, Senator Symms, Senator Laxalt, Senator Thurmond, who were kind enough to express their support publicly for me.

I am sorry Senator Helms had to take a little of what really should be criticism of me.

Senator **Stevens**. Not everyone has a stealth witness in a campaign, you know. You got in and got out without his knowing it. [Laughter.]

Mr. **Devine**. I would also like to deal with the media, which is really an unofficial part of the Government, and the Government personnel system. We have a very knowledgeable personnel media contingent. I won't ask them to stand up. They are at the media table. They have taught me a lot. I would especially like to thank Mrs. McGrory, who made a correction in the paper today. I think that is an example of the fine journalism we do generally get in Washington. I know I take a lot of pokes at the Washington Post, many of them deserving [laughter] when, in fact, they make an error. I would never attack any other person personally in public office. I have the highest regard for those on the other side. They have their point of view, and they have the positions that they must defend, and I don't think that politics should be carried out at that level.

Next, I would like to thank the other public employees in the Government who aren't here. I have probably met and dealt with more public employees than any other person in the United States. I visit them often in Washington, and I tell them straight out what I think. I visit them all around the country, explain our policies the best I can. And the most important element of our civil service, to me, has been how civil they have been. I have never been treated discourteously by Federal employees. We had a hearing on the House side a few weeks ago, at which AFGE had a large number of their supervisors—wearing their caps, and so forth. They were very clearly identified. And as often happens during hearings, there was a vote taken. During the break, I probably spoke to 100 or so employees, those who—with the strongest feelings, because they are union stewards. Even under those highly-charged circumstances, we talked civilly about disagreements on issues. And it has been difficult for them. That shows the great degree of civility of our public servants.

I have tried to change the system to make it based rather on performance than on tenure and seniority, giving each appropriate weight from our point of view. Others can differ as to the appropriate weight. But I have asked them to look at the whole system differently, and that has been very trying, changing the way we look at the civil service.

Second, I have mentioned some facts about our benefits system. Again, people can look at them differently as their facts may differ from ours. And that has been difficult. One certainly can't blame the Federal employees, as I have said many, many, many times. In fact, my own office of OPM, when I came into office, was still publishing a retirement brochure that said that the retirement system was fully funded by the Government 7-percent contribution and the agency 7-percent contribution. I certainly cannot blame Federal employees for being confused about the facts of the retirement system when the agency in charge of that system was publishing a brochure that, in fact, was absolutely wrong.

We have asked Federal employees to see Government as a shrinking institution in terms of size, although not in prestige; to see Government as a troubled industry, one whose balance sheet is seriously in the red; and we have asked managers and employees to perform better with less, and that clearly has been difficult, too.

I remember at my first hearing in the Appropriations Committee on the other side, in the House. When I told our oversight Appropriations subcommittee that I was going to ask for less money to run OPM, they simply could not believe it. We have tried to change the environment within which we manage the Government.

I am proud of how that work force has responded. As I have said many times, and has been reported widely, the problem in the Government is the system, not the people. We have good, talented people. What we need to do is to liberate them from the system which restrains their creative endeavors.

Finally, I must talk about myself. The President asked me to do a job, and that was to manage the Government better as we were declining its work force size. I believe I have carried out the order that he gave me. My salary and expense administrative funds are down 17.5 percent over 4 years. Correcting for raises and for inflation, that expense would be down one-third. We have adopted administrative reforms, have saved $6.4 billion by the end of fiscal

1985, expenses that would not have been saved if I didn't take action. With legislative savings, that comes to about $8.4 billion. Over the budget cycle through fiscal year 1990, that comes to $25.6 billion in savings. If Congress passes the proposals that the President has made in the budget, it would increase savings to $44 billion—because we take management seriously.

Basically, we are performing the same functions with 22.6 percent fewer people. That means incredibly increased productivity. We have proved at OPM that you can do more with less. That's my record. Based upon it, I humbly ask your favorable consideration for my renomination.

I know there are many questions. Several have been raised already, but I would prefer to respond to the questions as they are raised, and I would be more than happy to respond and explain the policies that we have followed at OPM over the past 4 years.

Thank you, Mr. Chairman, and members of the committee.

[Dr. Devine's prepared statement, biographical information, and responses to prehearing questions follow:]

Testimony

Before the

Committee on Governmental Affairs

United States Senate

by

Donald J. Devine,

Nominated to be Director of the

U.S. Office of Personnel Management

April 1, 1985

It is a great pleasure to appear before you to seek re-confirmation to the position of Director of the U.S. Office of Personnel Management. I was honored when President Reagan asked me to serve again, and I request your favorable consideration of my nomination.

As the Office of Personnel Management enters the second Reagan Administration, it is useful to look back at the first four years to review what I have done to manage the Government's civilian personnel and the funds used to support that civil service. Many standards might be used to evaluate my performance, but perhaps the central criterion ought to be how well I have kept the pledges which I made to you four years ago.

In his First Inaugural Address, President Reagan promised to reorient priorities -- domestically, to revitalize the economy, and internationally, to restore America's defenses and position in the world. The President set as a goal of his administration, "to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or the people." Later, he set as a goal the reduction of nondefense government positions by 75,000. To an American people disillusioned by the staggering growth of government in a period of economic stagnation, he also pledged to make government work.

As Director of the Federal government's civil service these past four years, that has been my the essence of my job: to make government work. At the time of my confirmation hearing before the Senate Committee on Governmental Affairs, March 11, 1981, I set six priorities to help accomplish that goal. The six priorities included: first, to handle the retirement case backlog; second, to implement the performance appraisal and merit pay systems by October 1st of that year; third, to address pay reform, particularly problems with pay compression; fourth, to deal with the question of personal liability of Federal officials; fifth, to work on the problem of the Civil Service Retirement System's massive unfunded liability; and finally to uphold the Government's civil service rules and laws. In answer to questions on numerous other issues at that time, I gave my best judgement as to what direction administration policy would take. Any balanced appraisal of the results these past four years will show that OPM has lived up to the commitments I made at that time.

Four years ago, I said that we would handle the retirement case backlog and we did. OPM cut the backlog of cases from an unacceptable 100,000 in 1981 to a normal, current caseload of 28,742 as of December, 1984. Of equal importance, we reduced the processing time as well, from 140 days down to 50 days.

In fulfillment of the President's 1980 campaign promise to reduce the size of the Federal Government's workforce, the latest available data (as of January, 1985) show that there are 107,178 fewer nondefense employees than there were in January of 1981 when this Administration entered office. Even with the increase in Defense employment, there has been a net reduction of 7,937. On a full time equivalent (FTE) basis, there has been a nondefense reduction of 78,775 work years, or a total of a 6.8 percent reduction. The 6.8 percent cut represents the largest drop in Federal employment in domestic agencies since the advent of the New Deal. Seventeen agencies, including OPM, reduced by 8 percent or more, saving $3 billion in salary costs. And, as I promised, most of the reduction, about 90 percent, was achieved in the most humane way possible -- through attrition.

I also pledged to deal with overgrading and poor position management. Last July, OPM issued a Federal Personnel Manual (FPM) bulletin (#312-8) to deal with that problem where it is most pronounced -- in the GS/GM 11-15 grade range. The proportion of the workforce in the GS 11-15 band has almost doubled in the past 25 years. With 39 percent of our Federal workforce in this range, the Government today has 50 percent more of its workers employed at high levels than the private sector. The President set a goal for us to reduce this "bulge" in the upper grade range by 40,000 positions over the next four years, and the FPM bulletin spelled out a plan to achieve that in the most humane way possible. Since normal attrition rates for the 11 to 15 band are between 5 and 8 percent, the goal set by the FPM issuance last July, of trimming the band by 2 percent per year for 4 years, can be easily achieved by just not replacing some of those who retire or leave for new jobs elsewhere.

In addition, I pledged to use incentives more effectively to reward outstanding performance. OPM worked closely with Senator Stevens and the Congress to pass a law, P.L. 98-615, that will advance that ideal for our managers and executives. The merit pay legislation created a Performance Management and Recognition System, covering the same mid-level managers in the GS-13 to 15 grade levels as were covered under the old merit pay system, but rectifying the problems of that system. A key feature of the new system established a standardized five-level appraisal system under which all covered employees would be paid on the basis of their performance. Better performing managers would be paid significantly more for their outstanding performance. OPM was one of the first agencies to put this new law into practice, and the results are encouraging. More employees received greater performance pay awards, and the awards were directly tied to the appraisal process.

We have clearly made notable progress in merit pay. Four years ago, one of the questions submitted at my confirmation hearing was: "Will the Office continue to develop the Civil Service Reform program, particularly the provisions for merit and incentive pay to encourage superior performance and for weeding out marginal or sub-marginal performers." I voiced my commitment to merit pay then as I do now: to make merit pay a reality for the whole government workforce, not just the upper level managers.

My second of the six priorities at that time was to successfully implement the original performance appraisal and merit pay system by October 1st of that year, and OPM did accomplish that. In response to a concern expressed by Senator Cohen at the last hearing, we prepared a governmentwide executive and managerial performance standard which emphasized cost efficiency. In fact, under this Administration, the government has become a management leader in performance management, with large private firms now using some of the same concepts that OPM implemented in the Federal workforce. OPM reviewed and approved the performance appraisal plans from agencies; issued policy and guidance to agencies; created a handbook and sample performance standards; and provided workshops, conferences, and comprehensive training to make merit pay a reality in the Federal workforce.

To establish merit pay throughout the government's white collar workforce and not just at the top, OPM developed and issued pay-for-performance and layoffs-by-performance regulations that will become effective July 1, 1985. Moreover, OPM worked diligently in other ways to promote pay for performance. In addition to working with the agencies, OPM held a special series of conferences with Federal and private sector managers on "Energizing the American Workforce"; continued the project at China Lake to study alternative methods of pay administration, with a strong performance-based pay setup, and alternative means of dealing with classification issues; and put special emphasis on merit-related programs already in effect, such as the Federal Incentive Awards Program (FIAP), which OPM administers. The productivity benefits of the merit concept in pay can clearly be seen in the FIAP, which provides cash and honorary awards to government employees whose special acts over and above their job requirements improve operations and reduce waste. In each of the past three years, we have topped the billion-dollar mark in savings through this program, for a total of about $4.3 billion saved. For every dollar paid in awards, the government saves $8 or more. And the winners are justifiably proud of their achievements, which serves as a genuine boost to employee morale.

When questioned four years ago about the actions and policies that I would take to raise the morale of government employees, I said that "the morale of the civil service can best be affected by a change in the government itself." I said that when the full system is reformed and government is serving its proper role in society, civil servants will have a greater pride in their activities, because they will be better accepted by the public. We are today in a period of great transition to that ideal. When completed, the positive effects will be felt. . The full effects of reform on the system have not yet been effected. Some workers have merit pay, most do not. Some get generous retirement benefits, while nearly 60 percent of new entrants actually receive little or no benefits. The existing reduction-in-force rules that put seniority over performance are bound to cause morale problems for low seniority women and minorities in the workforce who are the first dismissed under the present system. Even with such challenges, the 1983 Federal Employee Attitude Survey (FEAS) showed that 76 percent of the workers are satisfied with their jobs, and about 85 percent said they liked working for the government. Moreover, this indication of high morale was evident across each grade level. As I have said in the past, the problem is not with the people but with the system. We have a fine group of people in the Federal workforce. They need only the proper incentives to show fully what they can do.

We have done concrete things to deal with morale, too. Four years ago, in response to a question from Senator Eagleton, I said that we would address the issue of pay reform, particularly pay compression at the top levels. Changes in the Senior Executive Service bonus-for-performance system helped redress some of the problems in this very complex area. More importantly, OPM has taken direct steps to deal with the pay problem -- rated as the number one problem among executives when I entered office. To deal with pay compression in the upper ranks, for example, OPM has worked with Congress to spread the executive pay levels and raise the cap on top pay more than 40 percent. As a result turnover in the SES has been cut in half compared to the previous Administration. In addition, OPM implemented higher differential pay increases for 9,000 supervisors in 1983. And OPM strengthened the Special Salary Rates Program, which addresses personnel recruitment and retention problems caused by inadequate pay.

Another pledge I made in that testimony was to work on the problem of the unfunded liability of the Civil Service Retirement System. CSRS has a colossal unfunded liability of $528 billion -- more than one-half trillion dollars. The unfunded liability of this one program alone would increase the whole national debt by 30 percent, if we counted it as debt. OPM has made every effort to alert the Congress and the public to this enormous problem. More importantly, OPM has taken administrative actions to reduce that liability. Actions takento date by OPM will avoid $14.7 billion in obligations to the retirement system. And the President has transmitted to the Congress in his proposed FY 1986 budget other changes that OPM has been seeking, not only to save taxpayers money, but also to increase the integrity of the system for the benefit of future retirees. The budget's major proposals in this area would phase-in reduced annuities for early retirement; place a limit on the cost-of-living adjustments (COLAs); return to the use of the "high-5-year" average salary formula for computing annuities; phase out retirement credit for unused sick leave; eliminate adult student survivor benefits; and eliminate the minimum annuity provision, just as Social Security eliminated its minimum annuity provision and adult student benefit. These reforms are an important part of the Administration's plan for reducing the deficit, and they will also help the financial security of the system. And, after the reforms, the Federal retirement package would still be one of the best in the nation for its retiring employees.

In several key areas, OPM has already saved the retirement fund sizable amounts. For example, we tightened up in the area of early retirement where agencies indiscriminately used early retirement provisions. We now require agencies to prove that use of early retirement will actually be used to save jobs and will be more cost-effective than normal lay-off procedures. This has already saved $85 million, and the savings will total almost a billion over the next five years. Before my administration, up to 30 percent of additions to the retirement roll involved disability retirements, in a predominately white collar workforce. Employees hardly even had to demonstrate that they were disabled, and then only for the specific positions they occupied, a requirement inconsistent with the Rehabilitation Act. As an equal employment employer, we regularly hire people with greater disabilities than those who were opting for disability retirement. Under the new criteria we adopted, employees must now demonstrate they are truly disabled for any vacant position in their agencies at a similar pay level, and agencies are required to document their efforts at trying to find alternative placement. By taking these administrative actions, we were able to reduce the number of retirements by 58 percent, with disability funds now concentrated upon those who are truly disabled. This will save $1.1 billion by the end of this fiscal year, and will total well over $4 billion over the five year budget cycle.

Through the use of computer matching -- that is, matching OPM's computerized annuitant lists with those of other agencies -- we have been able to thwart those who in the past had been defrauding the government's retirement fund. For example, by matching our records with those of the

Social Security Administration's deceased payee files, we were able to stop payments to more than 200 individuals who were not eligible for benefits, and save $1 million per year for our retirees' fund. Another area where we applied this technique successfully was in stopping the previous practice of the government mistakenly paying student benefits to survivors who were no longer students. Last year we identified more than 3,000 of these cases and saved the retirement fund $2.3 million in that year alone. Working with the Veterans Administration, the Department of Labor, and the Social Security Administration, we began matching computer lists back in 1981 and have acted on thousands of such cases, saving $4 million last year alone. And that does not even include the additional millions saved by state and local jurisdictions in implementing similar computer match programs with tapes supplied by OPM.

Even with all of these savings as well as those achievable through the budget proposals, the current retirement system will likely never be fully funded. Past actions simply make that impossible. At least, these changes will make the system more secure for annuitants and more credible for taxpayers. But we do not have to make the same mistakes when we devise a staff plan for new employees.

OPM has prepared a retirement proposal for new employees hired since January 1, 1984 which is designed to avoid completely the unfunded liabilityproblem that plagues the present system. Although the proposal has not yet run the gamut of review within the Administration, I can say that the OPM plan would be a defined contribution plan greater in value than the average for plans used by Fortune 500 companies. No employee contribution would be required above Social Security, and each employee would be given an annual statement of account of his own balance. The government contribution would be put in the account and interest would be paid at the Treasury interest rate. Present employees would be able to convert to the new system by banking their and their agency's contribution of 14 percent over all the years of their service, plus the interest accumulated on that balance. The new system will be competitive with plans in the private sector and will attract many present employees to the new system.

I am sorry to say that we have not been able to fully solve the question of personal liability for Federal officials. OPM has played an active role in efforts designed to lead to the amendment of the Federal Tort Claims Act. The amendments would have granted Federal employees personal immunity from liability for Constitutional torts committed within the scope of their employment, and would also have waived the sovereign immunity of the United States to permit the Government to be named as defendant in lawsuits alleging violation of Constitutional rights by Federal agencies. I argued that individual liability is a disincentive for Federal officials to make the hard decisions necessary for efficient management of personnel and programs. Unfortunately, we have not been able to convince Congress to act in this important area. Several important lawsuits, supported by the Administration, notably Bush vs. Lucas, however, have served to mitigate some of the problems arising from the specter of personal liability, and OPM still actively supports legislation that would further protect Federal officials in this important area.

The final and most important priority that I set four years ago was to uphold the civil service rules and laws. In fulfillment of promise made in confirmation hearing testimony, on August 27, 1981, I sent a memorandum to the heads of departments and agencies asking for their support in upholding civil service laws, rules, and regulations and encouraging them to strengthen their internal personnel management evaluation programs. Meetings were held between OPM and agency directors of personnel management evaluation programs. OPM also completed a comprehensive review of policy for delegating examining and other personnel authorities, which was of interest to Senator Stevens at the last nomination hearing. He will be pleased to know that almost 200 delegations not meeting high civil service standards were revoked. To guide evaluators during the 1980s, OPM completed a totally revised personnel management evaluation handbook, including comprehensive program review guides for performance appraisal, merit pay, reduction-in-force, and FEORP -- the first revision of basic evaluation program guidance since 1973. OPM undertook a comprehensive program review in 1981 and has continued to review personnel programs in an ongoing fashion. Through the issuance of FPMs, bulletins, and various memoranda, OPM has continued to provide guidance to agencies governmentwide.

In 1983, OPM's Agency Compliance and Evaluation (ACE) division switched from a case-oriented, agency-focused, labor-intensive approach to a system-oriented, governmentwide, technology-intensive approach, markedly improving its ability to bring agencies into compliance with the civil service rules andregulations of the government. ACE uses data gathered from 900 statistically selected installations throughout Government to chart the status and progress of all major personnel management programs. The capstone of this work will be a Personnel Management Indicators Report showing progress towards efficient and fair personnel management.

Among the most important of civil service rules and laws are those which pertain to the employment of veterans. As Director of OPM I have worked to reinvigorate a program which had been allowed to languish. Among other actions we successfully sought to have the Disabled Veterans Affirmative Action Program (DVAAP) returned to OPM from the EEOC where it had been given a low priority. We instituted new training programs, we made veterans' preference a element in selections for the Presidential Management Intern Program, we worked actively for the extension and improvement of the Veterans Readjustment Act passed last fall, we regularly participate on the Secretary of Labor's Committee on Veterans' Employment, and we meet frequently with veterans organizations to listen to their concerns. These steps are paying off in the hiring statistics for disabled veterans, for Viet Nam veterans, for women and minority veterans. I am proud of the success we have had in bringing this program, too often neglected by my predecessors, to its current level and I am very proud of the awards I have received from groups such as the Disabled American Veterans and AMVETS for my efforts.

Any appraisal of an administration's progress in management ought to take into account how well the leadership has dealt with the tough financial decisions at hand. In 1981, I was faced with a $440 million funding shortfall in the Federal Employees Health Benefits (FEHB) Program, and depleted reserves. The premium increase that year would have been unacceptably high for employees and retirees. Through two rounds of tough negotiations, I acted to introduce deductibles and co-insurance cost-saving features to cut expenses. Although this action was questioned, the courts confirmed OPM's authority. The result was that the shortfall was turned into a surplus by 1982 and the reserves were replenished. In the next two open seasons, more than one million Federal employees switched to FEHB plans which actually had higher deductibles or more co-insurance than were mandated as a minimum by OPM. In the process, they saved themselves over one billion dollars in premiums. In addition, taxpayers will save approximately $2.2 billion by the end of this fiscal year as a result of these decisions. Recent studies show that private businesses are even following our lead in such health reforms, just as they have in pay for performance.

As Director of the Office of Personnel Management, I have believed in a prudent and careful stewardship of all public funds provided to us by the Congress of the United States. Under my leadership at OPM, we have been able to implement this philosophy and make significant inroads in reducing programcosts and saving the government, and therefore the U.S. taxpayer, significant sums while maintaining the high quality of our products and services. In S&E administrative funds I have reduced the budget by 17.5 percent in my four years, and when compared to the proposed budget I inherited from the prior administration, considering pay raises and general inflation, the savings increase to nearly $50 million or 33 percent.

In the entitlement programs for which we have fiduciary responsibility, retirement, health and life insurance, as well as pay and classification management, the savings have been even more significant. By the end of FY 85, we will have saved $6.4 billion administratively and $8.4 billion including legislation. We will achieve additional savings of $25.6 billion by FY 90. Along with these accomplishments, we have proposals presented in the current budget, which if enacted, will save an additional $10 billion through FY 90, coming to a total savings out of OPM managed programs of over $44 billion. I am proud of that record.

Although our budget was being reduced, we were still able to accomplish many improvements including:

-- reduction in average grade from a high of 8.8 to 8.3 and improvement in the supervisory ratios from 5.1:1 to almost 6:1, an improvement of over 17 percent;

-- consolidation and reduction of the number of OPM publications by 33 percent, reducing publications costs by 52 percent;

-- reduction in travel by $350,000 or approximately 15 percent;

-- closing of regional print plants and downgrading our central office printing facility;

-- centralization of the agency's payroll operations; and,

-- reduction of office space holdings by 19 percent.

From the beginning of my tenure as Director, I challenged agency managers and employees to be cost conscious and to look for more efficient and effective methods to accomplish our essential programs and services. I have consistently encouraged creativity and individual initiative throughout the agency. And OPM employees have responded enthusiastically. While OPM has reduced total employment more than 20 percent, we have increased productivity. We still handle essentially the same programs, and our unit costs are down and our processing time is faster. I could not be more proud of the staff. They are among the best in Government, and I will compare them with anyone, anywhere, any time.

This has been my record as Director of OPM. While there can be differences regarding policy, I have set our goals clearly and publicly, as desired by the President. Within these goals, I have managed the civil service effectively, fairly and efficiently. Based upon that record, I respectfully request re-confirmation as Director of the Office of Personnel Management.

A. BIOGRAPHICAL INFORMATION

1. Name: (Include and former names used.)

   Donald J. Devine

2. Position to which nominated:

   Director, U.S. Office of Personnel Management

3. Date of nomination:

   March 8, 1985

4. Address: (List current place of residence and office addresses.)

   Residence: 3311 Camden Street, Wheaton, Maryland 20902
   Office: 1900 E Street, NW, Room 5518, Washington, DC 20415

5. Date and place of birth:

   April 14, 1937, Bronxville, New York

6. Marital status: (Include maiden name of wife or husband's name.)

   Married, Ann Smith Devine

7. Names and ages of children:

   Joseph Devine, 18; Patricia Devine, 19; William Devine, 27; J. Michael Lewis (ward), 24.

8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted.

   Syracuse University, 1965-67, Ph.D. in political science, (June, 1967); City University of New York, 1963-65, M.A. in political science, (June, 1965); St. John's University, 1955-1959, B.B.A. in management, (June, 1959); and Bishop Loughlin High School, 1951-55, academic degree, June 1955.

9. Employment record: List all jobs held since college, including title or description of job, name of employer, location of work, and dates of employment.

U.S. Office of Personnel Management, director, Washington, DC, 1981 to present; University of Maryland, associate professor, College Park, MD, 1967-1981; U.S. House of Representatives, special assistant to Rep. John Ashbrook, Washington, DC, 1973; U.S. House of Representatives, special assistant to Rep. Philip Crane, Washington, DC, 1972; Brooklyn College, lecturer, Brooklyn, NY, 1964-65; Continental Casualty Company, senior claims adjuster, New York, NY, 1960-64; U.S. Life Insurance Company, cashier, New York, NY, 1956-60.

10. Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.

Transition Team leader for the Office of Personnel Management, Office of the President-elect, (1980-81). President's Commission on White House Fellows, (1981-present). President's Commission on Executive Exchange, (1981-present). Cabinet Council on Manangement and Administration, (1981-present). President's Commission on Integrity and Efficiency, (1981-present).

11. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

University of Maryland, associate professor; House Commission on Congressional Mailing Standards, consultant through Covington and Burling; National Right to Work Legal Defense Foundation, consultant. I am on leave of absence from the University of Maryland. The consultancies precede my appointment as Director of OPM in 1981.

12. Memberships: List all memberships and offices held in professional, scholarly, civic, business, charitable and other organizations.

American Conservative Union, Board of Directors; Young Americans for Freedom, Board of Advisors.

13. Political affiliations and activities:
(a) List all offices with a political party which you have held or any public office for which you have been a candidate.
(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.
(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 10 years.

a. Republican nominee for State Comptroller, Maryland, 1978; Parliamentarian and Executive Committee of the Maryland Republican Party, 1974-78; Member of the Republican National Committee Rule 29 Committee, 1973-75; Floor Officer at the 1972, 1976, and 1980 Republican National Conventions. Alternate delegate 1976 and 1980 Republican National Conventions. Delegate to the 1984 Republican National Convention and member of its Rules Committee.

b. Regional Political Director and Deputy Director of Political Planning and Analysis for the Reagan/Bush Committee, 1979 to 1980; Maryland State Chairman, Citizens for Reagan, 1976; Chief of Planning for Montgomery County's County Executive Race, 1970.

c. I do not believe any contributions exceed $50, but I have made numerous contributions to Republican candidates over the past ten years.

14. Honors and awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

United Negro College Fund appreciation award, 1982. AMVETS award in recognition of in behalf of veterans employed by the Federal government, 1984. Disabled American Veterans award recognizing "personnal commitment" to disabled veterans, 1984. American Men and Women of Science: Social and Behavioial Sciences. Contemporary Authors. Personalities in America. Social List of Washington, D.C. Who's Who in the East. Who's Who in American Politics. Who's Who in America. Who's Who in Government. Who's Who in Washington. Social Sciences Citation Index: 1970-77: 42 citations. 1976 A Symposium grant for "New Perspectives on John Locke," held at the University of Maryland, University College, November 18-21, 1976, sponsored by the Institute of Humane Studies. 1972 General Research Board, University of Maryland, Faculty Research Award. 1969 Department of Government and Politics, University of Maryland, Faculty Research Support Award. 1968 General Research Board, University of Maryland, Faculty Research Award. 1967 National Science Foundation, Doctoral Dissertation Research Award.

15. Published wirtings: List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

Books:

The Attentive Public: Polyarchical Democracy (Chicago: Rand McNally, 1970).
The Political Culture in the United States: The Mass Influence on Regime Maintenance (Boston: Little, Brown and Co., 1972).
Does Freedom Work?: Liberty and Justice in America (Ottawa, Illinois: Caroline House, 1978).
Reagan Electionomics, 1976-1984 : How Reagan Ambushed the Pollsters (Ottawa, Illinois: Green Hill Publishers, 1983).

Articles:

"Shopping Around: OPM Returns Insurance to the Market Place," Private Practice (January, 1985).
"Veterans Preference," VFW, (June, 1984).
"Fullfiling the Civil Service Reform Ideal in the Centennial Year," American Review of Public Administration, (Spring, 1983).
"Escape from Politics," The Bureaucrat, (Winter, 1982-83).
"American Culture and Public Administration," Policy Studies Journal (December, 1982).
"There Is No 'War on Civil Servants'," The Bureaucrat (Winter, 1981-82).
"A Fresh Look at the Status Quo...," Management, (Summer, 1981).

"The Challenge to Federal Employees Today," Labor Law Journal, (July, 1981).
"The Problem of Question Form in Describing Public Opinion," Polity, (Spring, 1980).
"A Communication on Crespi's Attitude Measurement, Theory and Prediction," Public Opinion Quarterly, (Spring, 1978).
"John Locke: His Harmony Between Liberty and Virtue," Modern Age, (Summer, 1978).
"Welfare Without Injustice," Modern Age, (Spring, 1977).
"Social Doctrine in the National Catechetical Directory," Homiletic and Pastoral Review, (August-September, 1977).
"Adam Smith and the Problem of Justice in Capitalist Society," Journal of Legal Studies, (June, 1977).
"Freedom and Distributive Injustice: A Communication on Rae about Nozick," American Political Science Review, (Sept., 1977).
"Welfare Without Injustice," Modern Age, (Spring 1977).
"Thucycides Epistimology," in University of Maryland Graduate School Chronicle, (April, 1971).
"Public Policy Solutions Through the Third Sector," with Lee Edwards, in Earnest A. Chaples, Jr. ed., Resolving Political Conflict in America, (Berkeley, CA: McCutchen, 1971).
"Voter Registration Could Assure Reagan Re-Election," Human Events, (June 16, 1984).
"A Winning Strategy for Ronald Reagan: The Devine Memo," Human Events, (July 5, 1980).
"GOP Establishment Battles Grass Roots," Human Events, (May 12, 1979).
"The Future of the Republican Party: Should Conservatives form a Third Party," Human Events, (Nov. 20, 1976).

Book Reviews:

Fryer's Recent Conservation Political Thought, for "American Political Science Review," (June, 1980).
Schuettinger's Lord Acton for "Modern Age" (Spring, 1978).
Rein's Social Science and Public Policy for "Briefer Notices" in the "Journal of Politics" (Feb. 1978).
Rosenau's Citizenship Between Elections for "American Political Science Review" (June, 1977).
Ure's The Political Impact of Mass Media for "Briefer Notices" in the "Journal of Politics" (May 1975).

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

Copies of the following speeches are attached in Appendix A1.

"The Civil Service in the Reagan Era," Federal Executive Institute Alumni Association, April 2, 1981.
Speech before the Convention of the American Society of Public Administrators, April, 1981.

Remarks to the Performance Appraisal Showcase, University of Maryland, May 28, 1981.
"Renewed Commitment to Veterans' Employment," Disabled American Veterans National Convention, July 13, 1981.
Speech before the American Legion, 63rd Annual National Convention, Sept. 1, 1981.
"Honoring Senior Executives in the Federal Government," Ceremony for Meritorious Senior Executives, November 4, 1981.
Panel Discussion "What Is Their Policy Role (If Any)? Who Respects Them (If Anyone)?," ASPA Convention, 1982.
"Career-Political Interface" panel discussion before the Senior Executive Association luncheon, July 1982.
"Federal Personnel Management", Federal Personnel Management Conference, October 23, 1981.
"Keynote Address," Conservative Political Action Conference, February 25, 1982.
"Problems in the Civil Service Retirement System," Government Printing Office Forum, May 3, 1983.
"Protecting Veterans' Rights," 38th Annual Amvets National Convention, August 11, 1982.
"Implementing New Federalism" American Legislative Exchange Council Eighth Annual Conference, June 19, 1982.
"Working Now and in the Future," World Future Society, August 11, 1983.
"Risks and Rewards in Federal Government Work," Harpers Ferry Conference, June 15, 1983.
"Cutting the Welfare State Budget," Conservative Political Action Conference, March 2, 1985.

Speeches prior to 1981 were submitted to the Committee in 1981 with my nomination. I do not have copies of those speeches immediately at hand.

17. Selection:
(a) Do you know why you were chosen for this nomination by the President?
(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

a. I presume it was because of my record at OPM over the past four years.

b. In addition to my background and experience cited in my 1981 nomination hearings, I have efficiently managed OPM over the past four years.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

I have a leave of absence from the University of Maryland. I have a book contract with Green Hill Publishers, Ottawa, Illinois. I have no other business relationships.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

   I expect to retain my memberships in the organizations listed in question 12.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

   I may return to the University of Maryland after government service.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

   No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

   Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

   Leave of absence from the University of Maryland and book contract with Green Hill Publishers, Ottawa, Illinois.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

   None.

3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

   None.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

   In my capacity as Director of OPM I have advocated the policies of this

Administration. I have encouraged Members of Congress to support the Administration's legislative proposals, especially those dealing with Federal employee matter. In addition, prior to 1981 I submitted expert opinion for the House Commission on Congressional Mailing Standards and the National Right to Work Legal Defense Foundation. I have been involved in many congressional issues through my activities in political and public affairs organizations and while I was special assistant to Representatives Ashbrook and Crane.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

   I do not believe there are any conflicts of interest which must be resolved in my case.

6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any other legal barriers to you serving in this position?

   Yes.

D. LEGAL MATTERS

1. Have you ever been displined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

   In May, 1984, Democratic Congresswomen Mary Rose Oakar and Patricia Schroeder made a frivilous complaint to the Department of Justice concerning anti-lobbying activity; I am unaware of any action taken or to be taken in response to it. In a similar complaint lodged against a subordinate, the Office of Special Counsel found no evidence of violation. Appendix D1.

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

   1984, Automobile, Montgomery County, Maryland, Montgomery County Police, noll. proc.

3. Have you or any business of which you are or were an officer ever been involved as a party in interst in any administrative agency proceeding or civil litigation? If so, provide details.

I have been involved in administrative agency proceedings or civil litigation only in my official capacity as Director of OPM.

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?

   No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

   None.

APPENDIX D1

[From the Washington Post, the Federal Diary, May 31, 1984]

OAKAR TAKES ON OPM OVER PAY EQUITY BILL

(By Mike Causey)

Rep. Mary Rose Oakar (D-Ohio) said yesterday she will ask the Justice Department and the Merit Systems Protection Board to determine if officials of the Office of Personnel Management violated federal law in their attempt to block her bill aimed at giving comparable pay treatment to women in government.

Oakar, who chairs a House subcommittee on federal pay and benefits, wants Justice to see if OPM Director Donald Devine and top aides broke the law barring executive branch agencies from spending money to lobby against pending legislation.

She also plans to ask the protection board's special counsel to see if OPM career staffers or political appointees breached the Hatch "no-politics" Act in working up strategy to block her pay equity bill.

The Oakar bill would require OPM to study pay and job classification to see if women—who are clustered in the 8 lowest pay grades—have been discriminated against, and if so what corrective action should be taken.

Last week OPM called in officials of federal employee unions to discuss the potential impact of Oakar's pay equity bill, which has been linked with a merit pay reform bill for federal supervisors.

Union officials testified yesterday that they came to the meeting thinking the subject would be an OPM plan to link the federal white-collar and blue-collar pay systems. But instead, Devine and other officials told the unions they believed Oakar's bill could result in job classification shakeups that could hurt men in blue-collar jobs.

The next day The Washington Post published portions of a memo to Devine from deputy associate director James L. Byrnes outlining how OPM could "create disorder within the Democratic House, pitting union against union and both against radical feminist groups" to block the Oakar bill.

OPM officials deny that any federal laws were broken either in the conduct of the meeting with unions, or in the Byrnes memo, which Devine said was simply an "option paper" that he requested and then rejected.

"Don Devine knows more about the Hatch Act than anybody around," an aide said yesterday. ". . . There is no way he, or anyone else at OPM violated it or violated the anti-lobbying law. The meeting with unions was to solicit their views on the Oakar bill." He described Oakar's call for an investigation as "just smoke."

The full House Post Office-Civil Service Committee today is due to report out the dual merit pay and pay equity bill. Action on it was blocked last week by a Republican member, but passage is expected today.

The merit pay bill would increase performance awards for supervisors and managers in grades 13 through 15 who are under merit pay. The Senate has approved a similar measure.

[From the Washington Post, the Federal Triangle, June 15, 1984]

OPM OFFICIAL EXONERATED

The special counsel to the Merit Systems Protection Board has declined to investigate a high-ranking official of the Office of Personnel Management who suggested that the Reagan administration take political advantage of the issue of "comparable worth" by "pitting union against union and both against radical feminist groups."

Counsel K. William O'Connor said that a "careful review" of a memo written by James L. Byrnes, a deputy associate director of OPM, found no evidence that Byrnes had violated the federal Hatch Act by engaging in partisan politics. Reps. Patricia Schroeder (D-Colo.) and Mary Rose Oakar (D-Ohio) had asked O'Connor to investigate Byrnes after his memo to OPM Director Donald J. Devine was uncovered.

The memo referred to a bill sponsored by Oakar that would require OPM to study whether there are pay discrepancies between female-dominated federal jobs and male-dominated federal jobs and make recommendations for correcting any inequities.

O'Connor said Byrnes "merely did what any loyal staff member should do—respond to a request of a superior for policy advice."

There is a difference, O'Connor said, between federal workers helping a political party or its candidates "in running for office—which is forbidden" and "in running the government—which is permitted."

Oakar called O'Connor's decision "outrageous" and said his "cursory treatment" of Brynes' actions raised questions about whether the special counsel's office is nonpartisan.

"As one who felt we should give up on the special counsel a long time ago, let me say that I was not surprised," Schroeder replied when asked about O'Connor's decision. "The office fills a slot on the organization chart but it doesn't do anything."

PRE-HEARING QUESTIONS FOR
DONALD J. DEVINE
NOMINATED TO BE
DIRECTOR OF THE
U.S. OFFICE OF PERSONNEL MANAGEMENT

I. Nomination Process and Potential Conflicts

Question 1

Why do you believe the President renominated you to serve as Director of the Office of Personnel Management?

Were any conditions, expressed or implied, attached to your renomination?

Answer

I believe that the President nominated me to serve as Director in recognition of my performance in that position over the past four years. No conditions expressed or implied were attached to my nomination.

Question 2

Is there any issue currently under consideration by the Office of Personnel Management from which you may have to disqualify yourself?

Have there ever been any issues over the past four years of your service as Director of OPM? If so, please explain.

Answer

There is no issue currently under consideration by the Office of Personnel Management from which I would have to disqualify myself as far as I know. I do not recall any particular issue over the past four years, but I would excuse myself from such issue if there were.

II. Responsibilities of the Director of OPM

Question 1	After four years of service as Director of OPM, has your view of the role of OPM changed? Please explain.
Answer	No, not substantially as can be seen from my answers to the committee's questions for renomination when compared to my original answers of four years ago.
Question 2	What do you believe are the most important functions of the position of Director?
Answer	My view of the role of the Office of Personnel Management is that the overriding responsibilities are to execute, administer and enforce the civil service rules and regulations of the President and of the Office of Personnel Management, and the laws of the United States governing the civil service. Its other major roles are to administer the retirement, staffing and classification activities of the government, recommend changes in such civil service rules as the President prescribes, and advise the President on proper civil service regulations, retirement procedures and pay issues. The role of the Office also includes the research and development of means to make a

more efficient and productive civil service and to delegate such responsibilities as will promote a more effective management of that system. This very importantly includes a strong oversight program to review the actions of such delegations, including the ordering of such corrective procedures as are necessary to conform with the civil service procedures under law.

Question 3 What actions have you taken to improve the morale of government employees?

Answer (1) We have created a challenging work environment where Federal employees can take pride in the work that they do and have assurance that they will be recognized and rewarded for good performance; (2) for senior executives and top managers, the pay cap has been increased by 44 percent during my tenure, solving the number one problem mentioned by senior executives when I entered office; (3) we have preserved the bonus-for-performance for executives and merit pay-for-performance for managers systems when they came under attack, have increased the number eligible to receive bonuses, as well as supported changes in the law which give further flexibility in awarding such bonuses; (4) for supervisors, we have increased the supervisory wage differential, after years of inaction by the previous Administration; (5) we have saved employees over three-quarters of a billion dollars in health insurance premiums by offering and publicizing more cost sharing in health insurance premiums, and have kept down increased premium costs well below projections; (6) we have decreased the premiums on employee life insurance; (7) we have reduced a backlog of 100,000 retirement claims and put the program on a current basis to assure retired employees that they will receive their annuities; and (8) We have taken many other actions to lead the Federal personnel management system to be a more effective and rewarding work experience.

Question 4 What action will you take in your second term as Director of OPM to improve the faith of the general public and the federal employee in the civil service?

Answer As I mentioned in my testimony four years ago, "to restore the faith of the general public and the Federal employee in the civil service, it is first necessary to return the Federal civil service to its proper role in society. As the result of the over-expansion of Federal Government activities over the years, the civil service has been forced to undertake activities which it was incapable of performing.**** This return to the proper scope of authority for the Federal Government will have the substantial benefit of restoring the faith of the Federal Government, and of government employees. The people expect the Federal civil service to be performing duties compatible with their values. When the government exceeds these boundaries, the inevitable result is a decline of trust and confidence in the civil service. I believe that history will show that the Federal civil service earned its highest degree of support when the Federal Government was acting within its proper scope of authority. The President's program to return the Federal government to its proper role will eventually result in a higher status for civil servants who are performing the essential tasks of government. When the American people recognize the government is operating within its proper sphere of activity, the prestige of the civil service will return."

The President has noted both that his Administration has made a new begining toward that goal, but also that there is much more to do. I believe, as I did four years ago, that adoption of the full President's program -- most importantly his reductions in government spending in the present Budget -- will begin to return government to its proper scope. When the size of government is smaller it will be more compatible with the people's values. When it is, the faith of the public and the Federal employee in the civil service will be stronger. I do believe that there is already greater pride in work among Federal employees since most have accepted the President's challenge to "make government work."

Question 5 What steps have you take to improve the operation of OPM itself?

Answer I have reduced OPM's administrative budget by 17.5 percent from my first budget to my 1986 budget request. For the Fiscal

Year 1986 budget itself, salaries and expenses will go down 9 percent, saving taxpayers more than $10 million. For the program changes that I have made administratively over these past four years, they will result in spending $6.4 billion less this year than would have been the case otherwise. At the same time, all of our indicators of productivity are up. We are processing retirement claims more quickly, and with lower overhead costs. Likewise, our staffing processing is being done on a lower unit cost basis. Overall, OPM has decreased its full time equivalent workyears by 18.8 percent since 1981. This has been accomplished while providing a better level of services. I consider this a major management accomplishment.

III. INTERNAL AND EXTERNAL RELATIONS OF OFFICE OF PERSONNEL MANAGEMENT

Question 1 In the past four years, what has been the relationship of OPM to (a) the President, (b) the Congress, and (c) other Executive agencies?

Answer The Director of the Office of Personnel Management is specifically made by law the President's advisor on the civil service. This has made him subject to the direction of the President. This relationship has existed primarily through Cabinet, Cabinet Council and other meetings with the President. It is clear that the responsibilities of the Director are first to the civil service rules and laws, which also makes the Director responsible to the ultimate rule-making authority of Congress. This necessitates a close working relationship between OPM and the Congress. Over the past four years, OPM has been in close contact with the members and staff of this and other Congressional committees. While we have not always agreed, I believe that a close and valuable working relationship has been established. OPM's relationship with other Executive agencies is twofold: it is first to advise the agencies of the civil service rules and regulations of the government and to ensure compliance with the civil service laws, rules and regulations. In addition, there is an obligation to assist the agencies in the efficient operation of their programs. In the second role, OPM provides technical management assistance to improve performance and overall productivity. The major means used is through promulgation of rules, regulations and guidance to agencies and formal and informal meetings with agencies to provide policy coordination, communication and assistance.

Question 2	After four years of service, has your view of the role of OPM in relation to the Merit Systems Protection Board, the Special Counsel and the Federal Labor Relations Authority changed?
Answer	It is the role of the Office of Personnel Management to present before the Merit Systems Protection Board, the Special Counsel and the Federal Labor Relations Authority the views of the

Executive Branch on personnel policy. This presentation is OPM's best judgment of a balanced view of overall Executive Branch personnel policy, as refined by its interpretation of Congressional intent regarding the true meaning of the law, especially through civil service regulations and guidance, which also includes a proper recognition of the role of labor unions and of government employees generally. So, while this is not a narrow presentation of "management's" position, it is the considered opinion of the Executive Branch on how to pursue efficient and fair personnel management in the Executive Branch. The authority of OPM to issue management guidance even in the labor relations area has recently been confirmed in court.

Question 3 Based on your experience, do you believe that any changes in the functions and authority of your office, the Special Counsel or the Merit Systems Protection Board are warranted?

Answer That question is under review. I do not have any recommendations at this time.

IV. THE CIVIL SERVICE REFORM ACT

Question 1 What oversight procedures have you established to monitor the implementation of the Civil Service Reform Act and assure compliance with merit principles over the past four years?

Answer The Agency Compliance and Evaluation division of OPM is the major oversight division within OPM to ensure compliance with merit principles. Using my statistical and survey research skills, I have reoriented our compliance and evaluation function to be based on a statistical rather than upon a case approach. This new, broader statistical approach will be less oriented to individual actions -- which are primarily the responsibility of the agencies, the MSPB, the Special Counsel in any event -- and more focused upon systemic problems which need to be brought to the attention of top management in the Executive Branch for action. OPM has been reviewing the implementation of the CSRA over the past five years and intends to issue a detailed report on that oversight within in the next several weeks.

Question 2 The Civil Service Reform Act allows the Director of OPM to delegate personnel functions directly to agency heads. Which functions have you delegated over your first term and what criteria did you use to make those delegations?

Answer In the first flush of post-CSRA enthusiasm, OPM's policy under the previous Administration was to delegate as much authority as requested. When I reviewed Title 5, I questioned the scope of delegations being made. Title 5 prohibits the Director of OPM from delegating "authority for competitive examinations with respect to positions which have requirements which are common to agencies in the Federal Government other than in exceptional cases in which the interest of economy and efficiency require such delegation and in which such delegation will not weaken the application of the merit system principles." In a study I ordered in 1981, it was found that a number of examining authorities involving common positions had been delegated to agencies that could not be justified as exceptional. Of particular concern was the decision to delegate examining authority for all positions at Grades GS-9 and above. Such a sweeping delegation of examining authority was not, in my view, consistent with the intent of the law. Corrective guidance was issued on March 10, 1982. This stated that OPM would not delegate examining authority for mid and senior level positions or for entry level positions previously covered by PACE which are common to agencies. To support delegation, an agency must also be the predominant employer for the occupation in the relevant labor market, and must have the resources necessary to operate, train and oversee the delegation.

In the two years following the issuance of the revised guidelines, 189 examining authorities not meeting the revised guidelines were withdrawn. However, new delegations meeting the guidelines were also established, so that the number of delegations of examining authority decreased by only 10 percent, from 835 to 747 in February of 1984.

OPM's policy has been to delegate where it is efficient and consistent with our interpretation of our obligation under the civil service laws, rules and regulations. We have attempted to establish a middle course between universal delegation and centralization. We believe this is in accord with Congressional intent. Congress did provide for delegations, but it did also amend the original language sent to the Hill to require that delegations not be done for positions which have common requirements.

V. CIVIL SERVICE RETIREMENT

Question 1 Does the administration plan to design its own retirement package for new federal hires? If so, where in the process is the package? What issues other than cost will be considered in design of such a plan?

Answer Yes. The matter is presently under discussion within the Executive branch. We will review all issues with the goal of producing a system which is fair to all employees and has a value which is equivalent to similar organizations in the private sector.

Question 2 OPM solicited and received a study of the retirement program from the consulting firm Towers, Perrin, Foster and Crosby. How will the conclusions and recommendations of the study be implemented with respect to the current system? To design a new plan?

Answer No, a totally new plan will not be devised. Rather the proposals in the budget represent our approach to reforming the present system. However, we expect to allow individuals covered under the present system to switch to the new system for employees hired after January 1, 1985 to allow them this alternative.

VI. FEDERAL WORK FORCE

Question 1

In your last confirmation hearing, you indicated that federal productivity levels were too low. Is that still your view?

Answer

Productivity is a ratio of work expended to unit produced. It is clear that workyears have declined over the past four years for most government agencies. This is most apparent in such agencies such as Education, with a 24 percent reduction in full-time equivalent employment, Housing and Urban Development with a 22 percent decline, OPM with a 19 percent decline, the General Services Administration with a 15 percent decline, and the Department of Labor also with a 15 percent reduction.

Overall, 17 of the largest 24 agencies in government have had a decline of 8 percent or more in their workforce. In most cases, this has taken place with an overall growth in budget. Certainly, however, more needs to be done to increase productivity. The President, therefore, has directed further reductions and efficiencies so that we can continue to make government work more effectively.

Question 2 Is it still your opinion that federal productivity can best be served by putting more resources into the performance appraisal, bonus, and merit system provided for by the Civil Service Reform Act?

Answer I still believe that performance appraisal, bonuses and merit pay-for-performance systems are critical to increase productivity. It is not so much that more resources should go into these areas, however, as it is that we must use present management resources in these areas more effectively. Management time can be used in many ways. We believe management effort is best put into upgrading the performance appraisal system. Such a system is important for employees so that they receive communication regarding what is expected from them. It is also important to them that it be fair. Our study of Federal employee attitudes suggest that a majority do think the present system is fair. But our study also shows that there tends to be too much over-grading of employee performance. The easy route for management is simply to rate everyone highly. It takes sound management to correctly evaluate performance. This is the only way to treat people fairly, to judge those who are truly outstanding as outstanding and those who have performed fully successfully as successful. Uniform grading is degrading to quality performance. Our major effort over the past three years since implementation of the performance appraisal system has been to upgrade it. We believe significant progress has been made throughout government, although much more needs to be done. Likewise, we believe that the bonus-for-performance for senior executives and the merit pay-for-performance for mid-level managers has worked well. We believe that the changes made in the law, with our support, will make these systems even better. Outstanding performers deserve more pay. Such mechanisms give such performers their just rewards. We believe this not only aids productivity, but that it is simple justice. We at OPM will continue our efforts to upgrade the performance appraisal and pay-for-performance systems and look forward to passing these benefits on to the rest of the employees in the civil service. They deserve these benefits too.

Question 3 What actions have you taken to attract talent to the civil service?

Answer Almost half a million Federal employees have been attracted to government service during my tenure as head of the civil service. An extensive network of recruiting and examination activities takes place throughout government, especially through OPM's network of area offices, to attract the highest quality employees to government service. In general, we have a quality examination product that produces a high quality of new entrants into the service. Where we do not, OPM is developing new examinations. In certain shortage occupations, such as scientists and engineers, special pay rates above the general schedule have been authorized to assure quality candidates when normal pay is significantly below the market rate. The President's Management Intern Program has been expanded to recruit top graduate school applicants into the mid levels of the service. An extremely high quality of candidate has been attracted into Presidential appointments, non-career senior executives and schedule C's. Likewise, we believe that the career Senior Executive Service has recruited talented individuals from outside government, as well as those who have moved up through the competitive service. Overall, we have high quality employees, although they are often forced to work under an antiquated system.

Question 4 What actions have you taken to stem the loss of high-grade, highly trained professionals to the private sector?

Answer Our data suggest that we are not losing high grade, highly trained profesionals to the private sector to any significant degree. If such happens we would expect to institute a special pay rate authority for that occupation.

Question 5 GAO recommended substantial improvements in Federal workforce planning procedures when you took office in 1981. You agreed with GAO's recommendations at that time. What has been done to implement GAO's recommendations?

Answer

Under this Administration workforce requirements have been carefully related to program needs. The latest data available (as of January, 1985) show that there are 107,178 fewer nondefense employees than there were in January of 1981 when this Administration entered office. Even with the increase in Defense employment, there has been a net reduction of 7,937. On a full time equivalent (FTE) basis, there has been a nondefense reduction of 78,775 work years, or a total of a 6.8 percent reduction. OPM has devised a new system to track workyear usage, hirings and separations throughout the year to assure sound workforce planning. The system also monitors full-time permanent changes as opposed to temporary and other type appointments. Recently, the system noted an imbalance in workforce mix of temporary employees, which led OPM to advise agencies of this change in workforce mix and recommend that agencies take appropriate action to address any imbalance in their workforce.

VII. MANAGEMENT ISSUES

Question 1

When do you expect to release OPM's study of the federal pay and classification system?

Answer

We expect to complete and release the study within the next several weeks.

Question 2 What are your plans for developing a permanent examination method for hiring federal employees to replace the PACE examination?

Answer OPM is operating under a consent decree signed in the last days of the Carter Administration. It required that OPM eliminate the PACE examination and replace it with examinations which guaranteed that the number of black and Hispanic applicants be in proportion to the number selected. This Administration has opposed that consent decree, but has taken the legal position that we have no recourse but to abide by it. We have issued four replacement examinations, and have two more that are at the stage of being implemented. Although we believe they are valid, we are not certain whether these replacement examinations can meet the requirements of the decree. OPM is also developing other replacement examinations. It must be understood that it took many years to develop the PACE and it will take a long period of time to create new examinations for each of the 118 occupations previously covered under the single PACE examination. In any event, OPM will abide by the requirements of the decree.

Question 3 What progress have you made toward improving personnel management information systems?

Answer

OPM is presently undergoing a major redesign and procurement of new computer hardware and software for the Central Personnel Data File. This will be achieved even with an overall decline in budget for OPM administrative activities. The present CPDF is outmoded, and we expect a new upgraded system to be at the state of the art to provide more accurate and useful information to top level executive branch decisionmakers. We have also involved management from agencies throughout government in the redesign effort to assure an integration of agency management information systems with the governmentwide information system.

Question 4

How will OPM be affected by the Administration's proposal to consolidate federal regional offices?

Answer

OPM is in the early stages of planning to choose the appropriate configuration. As these plans proceed, OPM will make certain that any changes are in the best interest of the programs, as well as provide for efficient program management.

Question 5

Do you agree with a National Academy of Public Administration recommendation that the current management roles performed by OPM, OMB, and GSA be transferred to a newly established Office of Federal Management?

Answer No. I believe the resulting entity would be too large and cumbersome for effective management. The present arrangement to have OMB represent the management of financial resources, OPM the management of people resources and GSA the management of property resources is a rational division. As far as personnel management is concerned, we believe that OPM's role of maintaining the integrity of the civil service system to some degree conflicts with OMB's role in the management of financial resources. I might mention that the director of OMB is also on record as opposing the establishment of the Office of Federal Management.

Question 6 Under 5 U.S.C. Section 4703, you have the authority to conduct and evaluate demonstration projects that would result in improved federal personnel management. To what extent have you made use of that authority?

Answer OPM is very closely following the demonstration project authority at the Naval Ocean Systems Command and China Lake, called the Navy Demonstration Project. We believe this project is investigating the major changes which need to be made in the government's personnel system. However, we have several other demonstration authority projects under review at the moment. OPM also proposed several demonstration projects under its regulations to provide pay and lay-offs based upon performance. A Congressional ban on these regulations covers these demonstration projects. When the ban expires on July 1, 1985, we will investigate further.

Question 7	Do you support a permanent reauthorization of the alternative work schedules program?
Answer	We have not as yet fully analyzed the data to enable us to reach such a conclusion.

VIII. EMPLOYEE BENEFITS

Question 1	What progress have you made in reducing the backlog of civil service retirement claims? Are there additional steps that might be taken to streamline this process?
Answer	When I first came to OPM, there was a backlog of 100,000 retirement claims. Processing time had risen dramatically. I immediately took steps to begin to reduce this backlog. Today, claims are handled more than twice as fast (from 140 days down to 50 days) and the number of claims on hand are simply the ones that are necessary to maintain an efficient processing operation. We continue to improve the process, although continued improvement will be made through incremental management reforms.
Question 2	What changes, if any, will you propose during your second term as Director of OPM to federal leave policies?

Answer The Grace Commission recommendations provide the basis for future Administration initiatives on leave policy, although modification and improvements will be made. At present, discussions are underway within the Executive Branch.

Question 3 Are your developing legislation to reform the Federal Employees Group Life Insurance Program (FEGLI)?

Answer We might consider some legislative changes, but discussion is at a very early stage of development.

Question 4 What progress has been made toward containing costs in the Federal Employees Health Benefits Program?

Answer Cost containment for FEHB has been a major priority of my administration at OPM. In 1981, I was faced with a $440 million funding shortfall in the FEHB program, and depleted reserves. Premiums were expanding at an unacceptable rate, to make them unaffordable for employees. I acted to introduce deductibles and co-insurance cost-saving features to cut costs. Although this action was questioned, the courts confirmed OPM's authority. The result was that the shortfall was turned into a surplus by 1982 and the reserves were replenished.

In the next two open seasons, over one million Federal employees switched to FEHB plans which actually had higher deductibles or more co-insurance then were mandated as a minimum by OPM. In the process, they saved themselves over three-quarters of a billion dollars in premiums. In addition, taxpayers will save approximately $2.2 billion by the end of this fiscal year as a result of these decisions. Further cost-sharing efforts have been achieved through changes in carrier plans to contain costs. We expect to see the results of these actions expressed in future premiums. The essential element of cost containment within the FEHB, however, is the competition between scores of insurance carriers. The Administration has introduced a voucher proposal which would expand this competition to contain costs even further. Even under the present system, great progress has been made, progress which is being imitated by the private sector.

Question 5 A recent study by Hay Associates concludes that total compensation for federal employees is 7.2% lower than that for private sector employees. Do you agree with that figure? Do you agree with the concept of total compensation comparability?

Answer In 1982, this administration made a decision to proceed on each item of pay and benfits policy separately rather than follow the approach taken by the last Administration and adopted for our first budget submission. The plan was to consider, as each proposal was made, what in fact was the total compensation picture, but also to move on each element of compensation policy separately. The decision was partially based upon discussions with the Advisory Committee on Federal Pay. The reasoning was that Federal pensions were so far more generous than those in the private sector, when based upon equivalent accounting methods, that retirement would so distort the total compensation picture as to make chages in the other areas impossible. In other words, gains could not be made in some areas if we consistently showed how far Federal employees were ahead of the private sector in retirement.

We do not agree that the Hay Associates study is accurate in concluding that total compensation for Federal employees is lower than that for private sector employees. First, it underestimates the true cost of the retirement system. Second, it underestimates pay. Hay did make some corrections to the present salary survey, but not all those necessary to fully correct the problems under the present methodolgy as is proposed in the 1984 President's Pay Agent's Report. If these corrections were made average Federal total compensaiton would be above that in the private sector.

The proposals in the budget on retirement, health insurance and pay were considered within the total compensation picture, but have been introduced separately in the interest of separate, constructive discussion on these issues. Even if all Administration proposals were adopted, the new reformed personnel system would start roughly at total comparability with the private sector, indeed with the Federal employee somewhat ahead.

IX. RELATIONS WITH CONGRESS

Question 1	If you are confirmed, do you agree without reservation to appear and testify before any duly constituted committee of the Congress?
Answer	I do agree without reservation to respond to any reasonable summons to appear and testify before duly constituted committees of Congress.
Question 2	Are you willing to provide such information as is requested by such committees?
Answer	I am willing to provide as much information to Congress as is reasonable and consistent with the responsibilities and resources of the Office of Personnel Management.
Question 3	How have you kept Congress informed of OPM's activities over the past four years and how do you plan to do so in the future?
Answer	OPM's Office of Congressional Relations and Office of Public Affairs have as major responsibilities the obligation to keep Congress informed of OPM's activities. This is done on a regular basis. In addition, OPM issues a yearly review of its activities which it makes available to Members of Congress.

OPM is in continuous contact with Congressional staff and Members, both in person and by written communication. We believe that we have communicated more with Congress in the past four years than has been so historically, and intend to continue this expanded level of communication.

Senator STEVENS. Thank you very much, Mr. Devine. I would like to go into an area that seems to me to be one of the problems that remains, probably the major problem that remains, to be solved between your agency and the Congress, and that pertains to the retirement program for new employees. Have you completed your proposal yet?

Mr. DEVINE. The Office of Personnel Management has completed its proposal to submit for clearance within the executive branch. It is now at the Office of Management and Budget and is being circulated to the other departments and agencies of the Government. I am sure you and many others are aware that the OPM proposals have been made public, and the reports in the press of its essential nature are basically correct. However, it must be reviewed further within the administration. Unfortunately, these things often leak out before we are ready to go ahead with them in a formal way, but this is part of the job.

It is essentially a defined contribution plan, which is fully funded by the Government. We believe it will have the special advantage of giving portable benefits, which I know that the Senator was concerned about in his own proposals that he made to change the system.

In fact, there are several similarities, as we learned from you on this matter as we went through the process.

It is basically a system where we would put aside about 11 percent, a little more than 11 percent, of pay into a retirement account. It would not be taxed until retirement, similar to an IRA. That amount would be increased by the Treasury rate for interest. I think it would have the tremendous benefit of letting employees know how much they had in the retirement system. They would get individual statements each year, which I think would give them an increased idea of ownership and feeling of being part of the system. Very importantly, a defined contribution plan is self-supporting. It would not have an unfunded liability, so it would avoid that very serious problem of the present system.

I think there are many positive things that would follow under our proposal. Employees under the present system could switch over to the new system and bring with them their own 7-percent contribution made by their agency, plus the historic interest rate for the Treasury rate. I think that will be attractive to many Federal employees who want to retain the option of whether they want to stay in the Government until age 55 or 65, whatever it would be. I think it gives a lot of options for present employees. I have spoken to some associations already, and they believe that a good percentage of their members would join. I think it is attractive in terms, also, of a proposal that we have made to allow up to $5,000 to be put in by the employees themselves, similar to a tax deductible IRA. I don't know how the Internal Revenue Service will react to that, but in any event, that is part of our proposal. We think that it is an attractive system for many Federal employees. And I think many will choose to change from the present system to this, should Congress adopt it.

Senator STEVENS. Has that been cleared by the OMB yet?

Mr. DEVINE. No, sir.

Senator STEVENS. When do you expect to submit it to Congress?

Mr. DEVINE. As soon as possible. I have a hearing tomorrow which I am supposed to testify on it. I would hope that OMB might have it cleared by then, but I am not sure whether they will or not.

Senator STEVENS. I don't think this is the time to go into the details of it. I think that we should get sort of an analysis of where various matters are that are under your jurisdiction.

For instance, have you completed your study on the Federal pay and classification systems?

Mr. DEVINE. No, sir. That has about another week or more to go.

Senator STEVENS. In answering one of our prehearing questions—and incidentally, all of your responses to the committee will be printed in the record—you indicated that the Federal Government is not losing high grade, highly trained professionals to the private sector. Do you have any real statistics to show what occupations we are losing? We have the impression that there is a midcareer exit going on, once again, from the civil service.

Mr. DEVINE. Sir, we have—I don't have them with me; I would be happy to put them in for the record—but we have done an extensive analysis, occupation by occupation, by years of service. It shows that we have extremely low turnover of individuals in the midcareer and late career status within the Government. We do have several hundred or over 100, in any event, special pay rate authorities where we do have recruitment and retention problems.

[The information referred to follows:]

CAREER EXECUTIVES LEAVING FEDERAL GOVERNMENT

Dates	Resigned[a]			Disc Serv. Retirement			Normal Retirement			Disability Retirement		RIF[d]		Death		Other[a]		Leaving Total		On-board Total SES & GS/ST
	SES	GS/ST		SES	GS/ST		SES	GS/ST		SES	GS/ST	SES	GS/ST	SES	GS/ST	SES	GS/ST	SES	GS/ST	
7/13/79 - 12/31/79	70	1		28	0		165	23		2	1	0	0	6	1	3	1	274	27	7049
1/01/80 - 6/30/80	69	2	2.4%	9	1	0.5%	407[b]	55	11.0%	8	1	0	0	6	3	6	7	505	69	7032
7/01/80 - 12/31/80	93	4		18	4		284	27		12	1	0	0	9	2	5	0	421	38	
1/01/81 - 6/30/81	158	2	4.9%	20[c]	3	0.9%	146	14	3.6%	2	1	0	0	12	2	13	3	351	25	6624
7/01/81 - 12/31/81	162	4		33	3		69	7		3	0	1	0	7	2	7	3	282	19	
1/01/82 - 6/30/82	122	1	3.4%	47	2	1.0%	94	10	2.4%	9	0	6	9	4	2	16	1	298	25	6700
7/01/82 - 12/31/82	99	5		18[c]	0		52	2		3	0	1	0	9	0	4	0	186	7	
1/01/83 - 6/30/83	78	2	2.3%	15	0	0.5%	102	9	2.6%	3	0	1	0	10	1	5	0	214	12	6929
7/01/83 - 12/31/83	75	3		18	0		65	5		3	0	1	1	4	0	11	1	177	10	
1/01/84 - 6/30/84	77	0	2.3%	16	0	0.5%	112	6	2.5%	4	0	1	0	4	2	25	0	239	8	6974
7/01/84 - 12/31/84	85	1		16	0		52	3		1	0	1	0	10	3	12	1	177	8	

[a] Not including reemployed annuitants who resigned or left for other reasons. They are counted once only at time of retirement.

[b] Feb. 1980 was end of retirement "high 3" for those given pay adjustment in Feb. 1977 from $39,600 to $47,500.

[c] Including one for performance for 1/01/81 - 6/30/81, 7/01/82 - 12/31/82 & 7/01/84 - 12/31/84

[d] Individuals separated in a RIF and eligible for discontinued service or optional retirement are reported in those categories.

CHART ONE
CAREER EXECUTIVES LEAVING FEDERAL GOVERNMENT

Dates	Resigned*	Disc Serv. Retirement	Optional Retirement	Disability Retirement	Death	Other	Total
7/13/79 - 12/31/79	73	29	188	4	7	4	305
1/01/80 - 6/30/80	69	11	454	8	9	13	564
7/01/80 - 12/31/80	95	21	308	12	11	7	454
1/01/81 - 6/30/81	126	17	154	2	14	25	338

*Not including reemployed annuitants who have been previously counted with Retirements.

CHART TWO

RETIREMENT TRENDS AMONG FEDERAL EMPLOYEES

PROBABILITY OF RETIRING WITHIN ONE YEAR OF ELIGIBILITY

	1978	1979	1980	1981
Employees at the Pay Cap				
All Ages	18.9%	27.9%	51.8%	
Age 55 - 59	18.7%	34.2%	67.1%	
Senior Executives				
All Ages	------	------		38%
Age 55 - 59	------	------		46.1%
All Employees				
All Ages	23.3%	25.8%	33.6%	
Age 55 - 59	25.5%	28.6%	39.3%	

CHART THREE
AVERAGE AGE AND SERVICE OF SENIOR EXECUTIVES

	1969	1971	1974	1977	1981
1. Average Age	52.2	52.3	52.9	52.1	49.7
2. Average Length of Service	22.7	22.9	22.5	22.4	20.5
3. Average Age at 1st SES Appt.	46.1	45.1	44.4	43.9	45.5
4. Average Length of Executive Experience*	6.1	7.2	8.5	8.2	4.2

*Estimate based on difference between average age and average age at first SES appointment.

Mr. DEVINE. As I mentioned to you before, I personally would like our ability to pay above the General Schedule to be increased even more than that special pay rate authority would allow so that if this is a problem—and we do have some problems there—we would like to increase the maximum. But in general, we do not lose people in mid-career or in late career in Government service.

Where we lose them is in the first few years.

Senator STEVENS. In another answer to the committee's prehearing questionnaire, you stated you had not analyzed the data that you have concerning the Alternative Work Schedule Program—the flexitime program which was my bill that was passed. That has to be either extended or permanently reauthorized. When will you complete that analysis, or have you already?

Mr. DEVINE. Yes, sir, we have completed that analysis and made it public. I testified last week on the House side, releasing that report, which is favorable to extending the Alternative Work Schedule Program.

Senator STEVENS. It is favorable?

Mr. DEVINE. Yes, sir.

Senator STEVENS. In another response to our prehearing questions, you referred to the antiquated system that your Federal employees work under. Can you expand on that? This is not really an antiquated system. It was passed in 1978.

Mr. DEVINE. Yes, sir, but as you are extremely well aware, we have not been able to carry out many of the promises of the Civil Service Reform Act. One of the merit system principles passed under the Civil Service Reform Act is that employees should be paid and retained based upon their performance.

In following through with that statutory injunction, OPM published rules to institute that requirement of the Civil Service Reform Act to make performance the central part of management in the Federal Government. We went through three different editions of that. In the third one, we believed that we had received the agreement of all parties that the compromise arrived at was a positive one, acceptable to all parties.

In fact, one of the parties in Congress was quoted at that time in the story as saying that the changes were acceptable and apparently later changed his opinion on that matter.

But we have made every attempt to work with Members of Congress and the staff of Congress, the employee associations, to come out with implementing regulations that would allow us to go forward with our pay and layoff based upon performance implementation of the Civil Service Reform Act.

Fortunately, the Senate—and I might mention both parties in the Senate, when this was considered in the Appropriations Committee—the Senate stood firm on going forward with these regulations.

Unfortunately, the House stood firm on the other side, but the Senate did prevail by saying that the regulations would go into effect July 1 of this year.

I believe that when those regulations are put into effect, we will have taken a major stride toward making the system based upon performance rather than the idea that rewards should follow automatically. I think that this would be a major step, which was set in the Civil Service Reform Act, to make the system less antiquated. It is because, in fact, we have not carried out the full implications of the Civil Service Reform Act for most of the work force that it is still antiquated, in my opinion.

Senator **Stevens**. Now let me get into this question that has been raised about these political appearances. Your response to the committee did disclose, as was proper, the source of reimbursements that you had received from various congressional campaign committees. And it indicated that you had been involved in the 1984 campaign. You have heard charges that have been made concerning the change of tradition as far as participation of the person who is the head of the civil service function in Government.

Do you want to respond to that?

Mr. **Devine**. Yes. I'm very happy that you mentioned that, and that Senator Eagleton is here so I can respond to that directly. Actually the history is quite a bit different than his staff research has been able to alert him to. I just finished reading, in fact, a biography of President Eisenhower which dealt with Mr. Young, who was then the Chairman of the Civil Service Commission, and mentioned how involved he was in the political functioning of the Eisenhower administration.

There is also—and I don't think it would serve any purposes, although I would be happy to respond if anyone wished that—there is a former Chairman of the Civil Service Commission who used his job so politically that he was both the advisor to the President on White House personnel policy and Chairman of the Civil Service Commission at the same time. That is, this man made both the political appointments through the White House—of course, which I do not have any connection with—and ran the civil service.

I also would like to remind those—and put in the record—that the so-called nonpartisan Civil Service Commission actually ran a network to identify political patronage within the career service, the so-called red ticket system, in which applications for career appointments within the civil service were ticketed with red tickets of favorable individuals with the right political credentials and those not.

I believe, and we may differ on this, but I believe that the Civil Service Reform Act was correct in making the Director of the Office of Personnel Management a clearly political official as the law says, responsible to the President. It took away the judicial functions that were, before the Civil Service Reform Act, under the Civil Service Commission, and put them under the Merit Systems Protection Board; and had the Merit Systems Protection Board chairman be out of politics, because, let's face it, personnel is involved within the political environment in this town.

Somebody is going to do it. The question is, is it going to be open and above board, or is it going to be done surreptitiously below board. There also has been mentioned the increased number of political appointments within OPM. In the past, many of them were actually hidden appointments within the career service. I believe the act did a tremendous good for the Government. It puts the political leadership of personnel management policy out front—clearly a political appointee, clearly responsible to the President—and allows Congress and the media and the public to look at what we are doing out in the open. That has been my policy.

If there is a political appointment to be made in the Government, it should be made through a political appointment and not subvert the career system. We have a system that is the oldest in the world in which there is a balance between both political appointees and career. And both are important. The system couldn't work without both. If we had a system that was just career appointees, it would be an ossified bureaucratic system, as happens so many other places in the world, where the bureaucracy rules the government.

If we had just a political bureaucracy, we would have the spoils system, and nobody wants to go back to that. I think a good civil service system is one that puts the political appointees out front and identifies them as such. If Congress thinks that we have too high a percentage, it sees them out front, and it can say, through passing appropriate legislation, there shouldn't be any more than such or whatever.

Senator STEVENS. But that is really not my question. My question is, why should the head of the Office of Personnel Management be permitted to make political speeches during campaigns against the people who are involved in the political spectrum when the people that he makes the rules for cannot do so? The civil service people covered under the Hatch Act cannot do that. And the tradition has been, in fact, that those people involved in making the rules for the civil service system did not get actively involved in politics.

Now mind you, I agree that the law was changed to permit you to do it. But the question that has been raised is, should you do it?

Would you address that?

Mr. DEVINE. I believe that it is appropriate for the head of a clearly executive agency to bring the President's message, his political message, to the people as do the heads of all agencies legally, although Senator Eagleton was correct in identifying several agencies that, by tradition, have not taken a part in political campaigns. That has not been the case, however, I would argue——

Senator STEVENS. Name one of your predecessors that made a political speech——

Mr. DEVINE. All of them made political speeches.

Senator STEVENS [continuing]. That went out and campaigned for or against somebody.

Mr. DEVINE. I don't know any that actually campaigned for or against somebody.

Senator STEVENS. Let me tell you, since I have lived in this town—on and off since 1950—they haven't. You are the first. That is what Senator Mathias and I warned would happen, and you are the first. Now, have you ever asked yourself, should the office you hold have that prerogative? I am not talking about expressing the President's policies on personnel management, the President's political approach to personnel, I am talking about campaigning right out on a stump, which you did last time. And again, you had the right to do it. It was your decision, but had you really analyzed what it means in terms of the future of the civil service?

Mr. DEVINE. Yes, sir; I looked at that issue very closely before I did that. I did it in 1982 as well as in 1984. I believe that an important part of the election in both 1982 and 1984 was how we manage the personnel system of the Government. And I believe that it was my obligation to take that message out in a partisan manner, in a partisan position, I think, in the most objective manner I could. I made a conscious decision to do it.

Interestingly, I have not been questioned on it in a hearing—although I have done it in two campaigns—until this moment. I had no indication other than maybe one or two letters on the House side that anyone was concerned about this, and since I heard nothing—I don't believe I heard anything at all about the 1982 campaign—and it is published in my financial statements.

Senator **Stevens**. Let me tell you. I have run several times now and twice when the administration was under the control of the other party, and should any of your successors decide to do that, I would welcome them. I can assure Senator Eagleton that if an Office of Personnel Management Director were to come to my State, I would know it, I would be there, and I would be so happy that you couldn't believe it.

Senator **Eagleton**. And you would know it, though, wouldn't you? [Laughter.]

Senator **Stevens**. Well, I would want to know it.

Senator **Eagleton**. And you wouldn't want to forget it, either.

Senator **Stevens**. But see, I postulate that it would be someone from the other party, because I don't think Mr. Devine is going to come up to campaign for my opponent. [Laughter.]

I still believe that the policy we articulated in 1978 was correct, and perhaps as a result of this hearing, we may get back to the point of examining that philosophy. I just do not believe that the person who makes the rules should have the prerogative to participate in the political spectrum when the rules he administers prohibit those who serve under him or serve with him from the same type of activity.

I am of the opinion that we should have precluded the Director from participation in the political process in terms of the campaign activity. Now, understand me. Past Civil Service Commissioners made it very plain where they stood in relationship to every President I can remember from Truman on down through the years, as far as the political aspects of public employment philosophies.

But not campaigning. Now, that was the distinction. Dr. Devine, you mentioned the red ticket. I don't remember the red ticket concept. Can you tell me, where did that come from? I spent 8 years in the Eisenhower administration, and I was a Presidential appointee, and I thought I knew pretty much what was going on, but I don't recall the red ticket.

Mr. **Devine**. It was during the Nixon administration.

Senator **Stevens**. It was a way of identifying people who had political persuasions identical to the President's; is that what you are saying?

Mr. **Devine**. Yes, sir.

Senator **Stevens**. I am going to have some further questions, but in the interest of time, let me announce that we have some conflicts as far as this hearing is concerned. This afternoon, there are two markups. One involves several members of the committee. So, we are going to have to continue the hearings tomorrow, and they will be continued at 10 a.m. They will be continued at 10 a.m. and again, at 2 p.m. It is my understanding that Dr. Devine must appear before the committee chaired by a good friend, Congressman Ford, tomorrow morning. We will have to ask if you would return tomorrow afternoon. We understand it was a previously scheduled appearance before the House. Is that correct, Dr. Devine?

Mr. DEVINE. Yes, sir.

Senator STEVENS. We cannot continue this afternoon because of these markups. So, we can continue tomorrow morning, and we will continue tomorrow morning with the other witnesses that are scheduled, and would request that you come back tomorrow afternoon.

Mr. DEVINE. You anticipate that you would need me tomorrow, also, or just the other witnesses?

Senator STEVENS. No, I anticipate that there are Senators here who indicated they wanted to ask you questions, and I have had to tell them that we cannot continue this afternoon, and that is because of the participation in these other markups.

So, there are Senators who wish to ask you questions who have left on the understanding that we would continue the hearing at 2 tomorrow afternoon. That was done in particular because of the circumstances we have to mark up your nomination Wednesday afternoon. Senator Eagleton has assured me that there is no intent to delay that.

But if you are not available tomorrow afternoon, we would then have to delay the markup on Wednesday afternoon.

Senator EAGLETON. Point of clarification on the schedule, Mr. Chairman, if I may?

Senator STEVENS. Yes.

Senator EAGLETON. Thus, tomorrow morning at 10 o'clock in room what, Mr. Chairman? Do we have a new room?

Senator STEVENS. It is Dirksen room 138.

Senator EAGLETON. Right. Tomorrow morning at 10 o'clock, as I understand it in Dirksen 138, we will hear from the six witnesses who were scheduled to testify at the conclusion of Mr. Devine's testimony.

Senator STEVENS. That would be our intention, to complete those six appearances tomorrow morning.

Senator EAGLETON. Tomorrow morning, right.

Senator STEVENS. And then tomorrow afternoon, we will return to Mr. Devine.

Senator EAGLETON. Mr. Devine, and starting at 2 o'clock; and may I ask, Mr. Chairman, will we stay in session long enough so that every Senator gets to ask the full scope of his questions? I ask that because we want to accommodate you and Chairman Roth in having the markup Wednesday afternoon at 2:30, and we intend to be there. We are not going to boycott it. But we want to ask our questions, of course.

Senator STEVENS. We have every intention to permit you to ask the questions, and it is my understanding that we will have that room from 2 o'clock on into the evening. I don't know how long the questions will go.

Senator EAGLETON. I think it will go into the evening, Mr. Chairman.

I want to ask you just one question, and then I am going to yield to Senator Chiles.

Senator STEVENS. I am just corrected. My staff tells me SD-138 at 10, this room again at 2 o'clock, and on until we finish tomorrow.

Senator EAGLETON. SD-138 at 10, this room at 2.

Senator STEVENS. Yes. Allow me to clarify that.

Senator EAGLETON. Thank you, Mr. Chairman. I just want to ask one clarifying question before I yield to Senator Chiles. Then I am going to leave the hearing room briefly and be back at 12:15.

This red ticket business under President Nixon, who ran the red ticket program?

Mr. DEVINE. I do not know, sir.

Senator EAGLETON. You were citing it as a matter of historical fact. There was a program called the red ticket program?

Mr. DEVINE. Yes, sir. There is a study at the Office of Personnel Management which I would be very happy to send you on it, but——

Senator EAGLETON. Would you send it up this afternoon to my office? I would like to read it. Was it operated or counseled by any of the political operatives on President Nixon's staff?

Mr. DEVINE. I believe it was. It was subject to a great degree of scrutiny at the time.

Senator EAGLETON. And some publicity?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And the publicity came out, in terms of contemporaneous time, at about the time that the Nixon enemies list came out, as well?

Mr. DEVINE. I'm not sure when that was.

Senator EAGLETON. It was pretty close.

Mr. DEVINE. It was probably in the same era.

Senator EAGLETON. Was Mr. Charles Colson involved in the red ticket program?

Mr. DEVINE. I do not know.

Senator EAGLETON. Was Mr. Haldeman involved in the red ticket program?

Mr. DEVINE. I do not know.

Senator EAGLETON. Was Mr. Dean involved in the red ticket program? [Laughter.]

Mr. DEVINE. I do not know.

Senator EAGLETON. Were any of the Nixon aids who ultimately went to the U.S. Federal penitentiary [laughter] involved in the Red Ticket Program?

Mr. DEVINE. I do not know.

Senator EAGLETON. Do you cite the red ticket program as one of the shining hours in the civil service system? [Laughter.]

Mr. DEVINE. I cite it as an example of what was wrong with the system and one of the reasons why Congress decided to change from the old Civil Service Commission to the new Office of Personnel Management and Merit Systems Protection Board system—to try to isolate these kinds of things—to have an independent watchdog in the Office of Special Counsel of the Merit Systems Protection Board and to separate those functions so they could watch the Director of the Office of Personnel Management. I think that is a very sensible way to try to deal with the problem.

Senator EAGLETON. You cite it as a matter of shame, do you not, Mr. Devine?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. It is a blemish on the record of the civil service system.

Mr. DEVINE. Yes, sir.

Senator EAGLETON. It was a bastardization of the civil service system, was it not?

Mr. DEVINE. I don't know if I would use that term. [Laughter.] But it is appropriate, I suppose.

Senator EAGLETON. I will reserve the remainder of my questions until after Senator Chiles completes his interrogation [laughter], and I will be here also tomorrow at 2 o'clock.

Senator STEVENS. For the record, it is not an interrogation, my good friend. [Laughter.] But it is a line of questioning.

Senator EAGLETON. With a sworn, adverse witness, it is interrogation. He is sworn, and I deem him to be an adverse witness. [Laughter.]

Senator STEVENS. Very well. The Senator is entitled to his interpretation.

The Senator from Florida is recognized to question the witness.

Senator CHILES. Thank you, Mr. Chairman. I want to welcome Mr. Devine to our hearing. He made a point to visit with me before this hearing, and I thank him for that courtesy. The only other point I want to emphasize is the nature of this particular nomination. When we passed the Civil Service Reform Act of 1978, we did specifically limit the term of office to 4 years. That is unlike nearly all of the other executive branch appointments for which a Senator is asked to confirm the appointee.

Mr. Devine is the first Director that this committee has been asked to confirm a second time for the same position. The committee is establishing a precedent. I think we should take it seriously. I don't think this is the same as confirming the Director of the Office of Management and Budget or other Cabinet offices. It is different. Mr. Devine's performance in office should be duly considered in our deliberations. I look forward to hearing some of what I missed of this morning's testimony.

Mr. Devine, what is your understanding as to why Congress limited the term of the Director of the Office of Personnel Management to 4 years?

Mr. DEVINE. I believe that it was a compromise worked out to try to be responsive, at least to some degree or another, to the concerns expressed by Senator Stevens and Senator Mathias as to the functions and the independence of the Director of the Office of Personnel Management.

Senator CHILES. Do you see any need to be independent of the White House in performing your duties?

Mr. DEVINE. No, sir.

Senator CHILES. You don't see any need for that?

Mr. DEVINE. No, sir.

Senator **Chiles**. Well, do you see any need for any Director as opposed to yourself, your personality, do you see any need for us to state that as the purpose, that we would like to have an Office of Personnel Management Director who is independent from the President?

Mr. **Devine**. I don't think it is necessary. I think that the establishment of the Merit Systems Protection Board and the Office of Special Counsel as independent from the Director of the Office of Personnel Management allows Congress' interests and the activities of the Director of the Office of Personnel Management to be observed.

That would be suggesting legislation which I have not discussed within the executive branch, so I can't state any opinion as Director. But, I think that it is not necessary. But, obviously, I am covered under the laws that exist.

Senator **Chiles**. I think that is true, and I think the conference substitute said that "the conference substitute deletes the limitation on the President's removable power contained in the Senate bill making the Director removable at the will of the President in order to provide the Director with a measure of independence from the President in performing his duties."

So, the law attempted to specify an independence from the President, did it not?

Mr. **Devine**. Yes, sir, and as I say, I have abided by that law. But I can't imagine that any Director of the Office of Personnel Management would be able to stay in office very long if he lost the confidence of the President. I think that it was a compromise that said both, in the law, that he was responsible to the President in one section of the law and in a different section of the law gave some degree of independence—which is not at all clear exactly how much independence is given.

Like many compromises, it is hard to say precisely what that meant.

Senator **Chiles**. Do you believe the Director of the Office of Personnel Management should be mindful at all of the need for conducting his responsibilities on a bipartisan basis?

Mr. **Devine**. I think it is absolutely critical that the role given to the Director of the Office of Personnel Management in overseeing the civil service system—in terms of its rules and its enforcement—should be done on an absolutely nonpartisan basis.

Senator **Chiles**. How would you evaluate your own performance in the last 4 years? Have you conducted yourself in a partisan or a nonpartisan manner?

Mr. **Devine**. In terms of administering the system, I believe that it has been entirely in a nonpartisan manner. I think it is quite unbelievable that in a position that receives the amount of scrutiny—where I have essentially a column devoted to me in the major newspaper in the town daily, looking at my activities, and a weekly newspaper where about half of it is filled with our activities—that there hasn't even been, as far as I'm aware, any allegations that any of our activities in managing the personnel system have had any partisan basis to them at all.

I don't believe that has any role in the personnel, civil service system. In one case at the Department of Energy, where there was some suspicion of that, and even though it wasn't clear that there was such an abuse, I made changes there to make sure that even if there had been, it wouldn't have had any negative effect.

So, I think it is important that the distinction be made. I think it is a difficult role for a Director to try to keep absolutely neutral, which I believe I have been able to do in terms of the mechanics of running the civil service system on the one hand, and yet second, being the spokesman for the President on personnel matters.

I think it is difficult, and I think in many people's mind, one can flow over into the other, but I believe that I have been meticulous in keeping the two separate.

Senator CHILES. Mr. Devine, I understand that in September 1984, you sent letters to the Governors of Ohio and Texas and New York concerning the conduct of voter registration drives. Would you give me your explanation of that event, of those letters?

Mr. DEVINE. Yes, sir. I read about allegations in a Wall Street Journal editorial against the State of New York in which they mentioned that they believed that similar activities were going on in the State of Texas and the State of Ohio.

As a result of reading that, since we have enforcement responsibilities over the Intergovernmental Personnel Act, with regard to an inappropriate use of Federal funds to conduct registrations in other than a neutral fashion, I requested information from the Governors of those States.

Unfortunately, they chose to go to the press rather than simply respond, and it became political.

However, I don't believe that it was political by me, but rather in their reaction.

Senator CHILES. Did you notify all of the States at the same time? Did you make that request of all of the States?

Mr. DEVINE. No, sir. We had only received statements that there might be problems in those three States, and so I only sent it to them.

Subsequently, however, once my letter was leaked in each of the three States, I then recognized that it was going to take on a political measure, and that it would be appropriate to ask all the States to respond to the same questions.

Senator CHILES. Those happen to be three States with Democratic Governors. You said after this became public, then you wrote to the other States. But prior to that time, you didn't feel there was any other reason to write to the other States?

Mr. DEVINE. Yes, sir. Unfortunately, though, most of the States have Democratic Governors, and on any random basis, you would tend to end up with a disparate proportion of——

Senator CHILES. I can't comment on why the States have done that. I would like to hear you reconcile your duties as the Director with your partisan political activities, specifically your participation as a delegate to the Republican Convention and your campaigning for Republican candidates.

Mr. DEVINE. I believe that the Civil Service Reform Act very clearly changed the nature of this position to make it similar to the other executive branch agency heads throughout the Government—who, in general, are permitted and, in fact, expected to participate in campaigns. I believe that although there were some differences in the nature of my position, those differences were not essential differences and it was proper and even incumbent upon me to be involved in those campaigns.

Senator CHILES. You say it is expected of them. Is it expected of the Attorney General that he go into individual States and campaign on a partisan basis? I didn't know that was expected of the Secretary of State or the Attorney General, for example.

Mr. DEVINE. Historically, the Attorney General, the Secretary of State, and the Secretary of Defense have not taken that view of their office although, legally, they could.

But historically, those three positions have been excused from campaigning responsibilities and both parties are——

Senator CHILES. Do you see any similarity between the role that you play as the Director of the Office of Personnel Management and a sensitivity like an Attorney General, or a Secretary of State, or a Secretary of Defense, or do you see no sensitivity there?

Mr. DEVINE. Well, it's sensitive, obviously. But I believe that my office is set up as one of the Governmentwide management agencies—with the Office of Management and Budget and the General Services Administration; that its responsibility is closer to theirs and to other agency heads than it is to the Attorney General, or the Secretary of State, or the Secretary of Defense.

Senator CHILES. And that exception of the 4-year limitation and the quote that we wanted it to allow an independence from the President, that doesn't make any difference in your office?

Mr. DEVINE. Well, I think that that was something to be considered, and we did consider it. But I think on balance that what was intended, as you correctly read, was the giving of independence from the President, which did not mean that one couldn't be involved in promoting his reelection. The independence, it seemed to me, was to come in the other direction; that it would give the Director of the Office of Personnel Management independence from Presidential orders that might politicize the civil service system. I thought that it was going in that direction rather than going back in the other direction.

I still believe that that is what the intent of that change was. Again, it was a compromise, and there isn't much legislative language other than what you just read. So, it could be interpreted differently. But I think it is clear. But it is a judgment call.

Senator CHILES. You have been quoted, Mr. Devine, as referring to Members of the Congress as snowflakes. There must be some context for that quote. I wonder if you would provide it for me.

Mr. DEVINE. Yes. It's been quoted twice already, I believe.

Senator CHILES. I'm sorry.

Mr. DEVINE. Yes; I know.

Senator CHILES. I wasn't here.

Mr. DEVINE. I said something I don't think is unexceptionable, that too many bad ones are not a good thing. I don't think that many would disagree that too many bad Congressman are not a good thing.

Senator CHILES. I was trying to get the context of snowflakes. Is it too much snowflakes is not a good thing, or snowflakes are——

Mr. DEVINE. I guess it differs in terms of States. It would be much worse in your State than Mr. Stevens'. [Laughter.]

Senator CHILES. Mr. Devine, tell me briefly what the quit-rate measure is and what it is used for.

Mr. DEVINE. There are various measures that we use to analyze the nature of the Federal work force, the same as is used in the private sector. One looks at what the turnover rate is—the different occupations, for the work force as a whole, for departments, different groups within the work force. A quit rate is one of those. It's a shorthand term used in the personnel management literature for a voluntary resignation.

Senator CHILES. Well, I am particularly interested in hearing your views on what the problems or limitations to using this measure are, or do you see any problems?

Mr. DEVINE. The basic use of the measure is to allow us to measure the activity that takes place within the Federal work force. We published a study at OPM which suggested that if one wished to go to a market pay system for Federal employees, that voluntary turnover rate could be used as a measure for that.

Senator CHILES. Are quit rates used much by the private sector personnel administrators?

Mr. DEVINE. Yes, sir.

Senator CHILES. Could you explain; tell me how they use them or whether they use them?

Mr. DEVINE. Yes. The main reason it's used is to assess the compensation and general human relations management attributes about the corporation. If you have an extremely high quit rate, you are probably not compensating enough or you have some very serious morale problem. If you have a very low quit rate, you are probably overcompensating; and it is used as an indicator of roughly how well you are dealing with your people in the organization.

Senator CHILES. Do you think that is a fair determinant that if you have a low quit rate, you are automatically overpaying, that you ought to reduce your pay?

Mr. DEVINE. No, sir; I don't think it automatically means that. But it is, if you are going to pick one single indicator, probably the most useful one. On the other hand, most systems use multiple indicators, as we do in our special pay-rate program at present.

Senator CHILES. Do you believe that Federal pay should be competitive with the private sector? Is that a principle we should stand for?

Mr. DEVINE. Yes, sir.

Senator CHILES. How do you size up the present situation? Are Federal employees competitive?

Mr. DEVINE. I believe it makes a great deal of difference depending upon what part of the work force that you are looking at. I think at the highest levels—the career Senior Executive Service, those with major responsibilities, the higher level political appointments, Members of Congress, members of the judiciary—in general, they tend to be undercompensated relative to the private sector, in the Government.

Senator CHILES. I take it——

Mr. DEVINE. And the——

Senator CHILES. I take it that you believe the 5-percent pay cut is fair and can be reconciled with the principle of competitive pay?

Mr. DEVINE. The basic reason that the administration has requested a 5-percent pay cut has been because we believe that we are a troubled industry in Government, with $200 billion deficits; we have a company seriously in the red, and companies in the private sector which were in similar straits, in order to put their economic house back in order, had to take serious steps to redress their organization's health.

We believe that Federal employees should play their part in getting the expenses and the operations of the Federal Government back into a healthy environment. We don't think they should take a disproportionate share. I sat in the Cabinet meeting when Mr. Stockman briefed the President on our budget proposals, which go well across the board and attempt to ask every segment of society to bear a part of the burden to bring this very serious deficit problem under control. And we believe that one part of that should be done in terms of a reduction in pay. We don't like it, I don't think anybody deserves a reduction in pay. But I think that we have a serious problem and that we have to do something about it.

Senator CHILES. Did the Bureau of Labor Statistics discontinue quit-rate surveys?

Mr. DEVINE. Yes, sir.

Senator CHILES. That was done since the Reagan administration has been in office?

Mr. DEVINE. I believe so.

Senator CHILES. Can you tell me why they discontinued them if they are useful? Why on President Reagan's watch would they discontinue?

Mr. DEVINE. I don't know anything other than what I have heard from my staff on this matter. But as far as I understand, they believe that the private sector is able to collect their own data and that it shouldn't be subsidized by the Government. So since the incentive was high for private companies to find out this data for themselves, they would invest their funds to find out what the quit rate was.

Senator CHILES. Mr. Devine, as you know, Senators Sasser, Pryor, and Bingaman wrote Senator Abdnor, chairman of your Appropriations subcommittee, concerning public relations practices by your office. Would you tell me about that situation and whether that was a partisan shot by these Senators or whether they had some legitimate concern?

Mr. DEVINE. I'm sorry, Senator. I don't recall the letter in particular.

Senator CHILES. Can we have a copy of this handed to him. I will give that to you. It says:

> According to recent news reports, the exact figure the Government spends a year on public relations experts is not known. In 1975, the General Accounting Office attempted to determine the total cost of such public relations activities, but failed. One 1975 report estimated that public relations activities cost $1 billion. Although recent efforts have been made to reduce public relations costs, the real figure, although difficult to determine, may be excessive. In particular, one executive agency, the Office of Personnel Management, in our opinion, has been responsible for questionable and excessive public relations efforts.
>
> Recent news articles have reported on a concentrated media blitz by the Office of Personnel Management. OPM Director Donald J. Devine reportedly has appeared frequently on television, radio, and in the news print criticizing Federal pay and benefits. In a September 7, 1983, Dayton Daily News article, Devine advanced his

ideas for a new pay-for-performance system while attacking current rules for providing no punishment for nonperformance, stating that there is a fervent effort by Federal unions and some Members of Congress to keep it that way.

Director Devine's views on the new pay-for-performance system which he is advocating are also well known in Washington as a barrage of press releases on the subject have been released.

One release, in particular, issued after a House Subcommittee on Treasury, Postal Service and General Government Appropriations voted to delay implementation of the new pay-for-performance regulatory changes proposed by OPM was extremely critical of the House action.

In the May 5, 1983, release, Devine noted four Democratic Members of the House Subcommittee on Treasury, Postal Service and General Government Appropriations have separated themselves from the President and the American people who want more efficient Government as well as the civil service, who support pay for performance.

A copy of this release is attached. OPM has also been responsible for issuing other publications under the guise of public relations which are of questionable content and purpose. We are also enclosing a recent copy of the Management magazine issued by OPM on a monthly basis. This publication raised issues which have little or no relationship to Federal personnel management. We are aware that the Appropriations Committee routinely has included a prohibition against lobbying for Federal agencies, and such prohibition is contained in section 608 of last year's Continuing Resolution.

Inasmuch as lobbying with taxpayers' dollars is prohibited by political appointees, and it appears that excessive expenditures for public relations and perhaps lobbying are being made by the Office of Personnel Management, we would encourage you to review the OPM budget with an eye toward restricting these costs.

And then that was signed by Senators Sasser, Pryor, and Bingaman.

Senator STEVENS. Could I just indicate, I think this has to be the last question.

Senator EAGLETON. Could I have one?

Senator CHILES. I would be happy, if I have gone beyond my time.

Senator STEVENS. We must quit at 12:30.

Senator CHILES. OK.

Mr. DEVINE. I would like to respond to that.

Senator CHILES. If you don't recall that now and want to respond when we reconvene——

Mr. DEVINE. No, I recall it quite well. I would like to mention two things: First of all—as I show on page 15 of my prepared statement—through consolidation and reduction of the number of OPM publications, we have reduced publications 33 percent and reduced publications costs by 52 percent in the Office of Personnel Management.

Second, in terms of the nature of our activities and whether they went against the prohibitions of the Lobbying Act, this particular charge was referred to the General Accounting Office. They specifically said that the activities were proper—for a Government agency head to make public the activities of his organization to Members of Congress and to the public.

We had a specific ruling on that, which said that our activities were proper.

Senator CHILES. Should public relations people be issuing releases on the legislative process while it is ongoing?

Mr. DEVINE. I believe it is important that the public and Congress—and both of them, of course, are involved in many different things—that they know where particular pieces of legislation are, as they are going through Congress, and what the status of those recommendations is.

Some have been concerned about whether, in fact, we let Congress know what we are doing and what our activities are and what our views are. I believe it is part of our activities to state our views so Congress knows them and can act with the knowledge of the executive branch's view of what is taking place during the legislative process.

Senator STEVENS. Senator?

Senator EAGLETON. Mr. Chairman, I have a couple of very brief questions, staying within the time constraints.

Would the group that Dr. Devine asked to stand up for OPM please stand up once again. Dr. Devine introduced quite a number of people. Can we get a rough count of how many people he has brought with him here today?

Senator STEVENS. Give us the accurate number for the record, will you, please?

Senator EAGLETON. Stay up, sir, if you don't mind.

Senator STEVENS. Who is counting?

Senator EAGLETON. I thought a gentleman in the back was counting. It appears to me it is about 30. Would that be a fair estimate, Dr. Devine.

Mr. DEVINE. I have no idea.

Senator EAGLETON. Unless I hear an objection, 30 will be the number inserted in the record as the number who stood.

Would those Schedule C seniors not under merit protection, the Schedule C folks of the 30, stand? Seven, I count, Schedule C. Are any of you members of what Dr. Devine calls regional representatives or what is referred to otherwise around town as "Devine's commissars" or "thought control"? [Laughter.]

Do any of the seven fall into regional reps? Is Mr. Joseph Root here? [No response.]

Mr. Alan M. Wandling? [Response.]

Mr. Gary Giesick? Mr. Brian Carey and Ms. Bertha Nelson? None of them are here.

Mr. Devine, this afternoon, if possible, would you send us first, biographical data on these 5 names that I have just mentioned and then your appraisal of what qualifications they brought to OPM; what the relationship is between these 5 people as aforesaid and the 10 regional directors that are provided by law. That is, why do we need these 5 superimposed on the 10 that exist in the law, and what qualifications these 5 brought to the personnel service; and then finally, what their political activities were, offices held, committeeman, committeewoman, campaign chairman or chairperson; what the political roots of these 5 were.

I would like to have that this afternoon or early tomorrow morning, so that we can pursue it at 2 o'clock tomorrow afternoon.[1]

Thank you, Mr. Chairman.

Senator STEVENS. Thank you, Senator.

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[1] The information referred to may be found in the committee files.

Mr. DEVINE. Senator, if I could ask for a clarification, Mr. Giesick actually does not work for me and has been away for many months. Mrs. Seawright has actually taken his place.

Senator EAGLETON. What is the name?

Mr. DEVINE. Seawright.

Senator EAGLETON. Did Mrs. Seawright once hold the Denver-Dallas——

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Give us the same information on Mr. Giesick, who has departed our midst, and Mrs. Seawright, who has entered our midst.

Mr. DEVINE. Mr. Root is actually on extended leave. He is seriously ill. Do you still want his——

Senator EAGLETON. Yes, still want him. Who is his successor? Is there an acting?

Mr. DEVINE. No, sir.

Senator EAGLETON. That job hasn't been filled?

Mr. DEVINE. No. I am hoping that he might recover and he will come back.

Senator EAGLETON. Put the date that Mr. Root went on extended leave, then, please.

Senator STEVENS. Thank you very much. I want to thank Mrs. Devine, Patti, Joe, Mike, and Bill for coming with your father. It was a very thoughtful thing to do. You would be welcome in any of these hearings. As I indicated, we will continue these hearings tomorrow morning at 10 a.m. in SD-138 and then we will be back here at 2 p.m. tomorrow afternoon to hear from Dr. Devine.

Thank you very much.

Mr. DEVINE. Thank you.

[Whereupon, at 12:35 p.m. the committee was recessed, to reconvene at 10 a.m. the following day.]

RENOMINATION OF DONALD J. DEVINE

TUESDAY, APRIL 2, 1985

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The committee met at 2:04 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Mathias, Eagleton, Levin, and Gore.

Senator Stevens. It is time to proceed with the further hearings on the nomination of Mr. Devine.

Mr. Devine, you have been sworn. This is a continuation of the hearing, and for the purposes of this hearing, I am sure you understand you are under oath according to the rules of the committee.

Mr. Devine. Yes, sir.

Senator Stevens. Thank you.

Senator Eagleton.

Senator Eagleton. Thank you, Mr. Chairman.

Mr. Chairman, I would like to outline for the benefit of you, as Chairman, and for Mr. Devine, as the witness, how I intend to proceed in this questioning so that it has some logical framework to it, and so we can fit all of the pieces of the Devine puzzle into a coherent whole.

At the outset, I want to pursue one loose end of yesterday's testimony by Mr. Devine. Completing that, I will then pursue further questions, hopefully not repeating those already asked by Senator—well, those stated by Senator Sarbanes in his statement, quotations, et cetera.

You remember snowflake, when he said, "There was a lot of snow in Alaska"? I won't dwell on that.

Senator Stevens. I remember.

Senator Eagleton. Unless you have got a better punchline today that you want to unveil?

Senator Stevens. In Alaska we have what is called termination dust. Do you know what that is? That is when the snow starts coming down the side of the mountain, and we know at that time it is coming toward the end of summer. So, when the snowflakes start coming down here, we will know that the hearing is about over. [Laughter.]

Senator Eagleton. Sorry I brought it up. [Laughter.]

We will complete the political involvements and the political endeavors of Mr. Devine. That will be the first major area of questioning. Then we will get into 12 substantive areas, dealing with the administration of the Office of Personnel Management.

As I get into each area, I will announce what it is so that Mr. Devine can begin focusing his mind on that particular area of substance, and we perhaps can all follow it in a more orderly way.

Senator STEVENS. Could I interrupt right there?

Senator EAGLETON. Yes.

Senator STEVENS. My staff was in contact with Scotty Campbell last night, who was OPM Director, as you will recall.

Senator EAGLETON. Yes.

Senator STEVENS. I had indicated in my comments in questioning Mr. Devine yesterday that I thought that he had made a decision to be involved in politics in a manner that did not have precedent. I am told that Mr. Campbell did make appearances for candidates in their districts and during the campaign period, during which he discussed the civil service reform proposals for Mrs. Schroeder, for Herb Harris in northern Virginia, and for Senator Percy, who is one of the authors of the Reform Act and was a candidate in 1978.[1]

So, there is a precedent for having been involved in campaigning, but I would say that from my information, he was not involved in campaigning against a candidate.

Senator EAGLETON. And at least a footnote can be added. He was a political switch-hitter.

Senator STEVENS. Yes. Well, he did campaign on both sides of the aisle. He made appearances during the campaign periods with incumbents on both sides of the aisle in a campaigning sense, but did not campaign against any Member.

Senator EAGLETON. Still dreadfully poor taste on Mr. Campbell's part, and I think probably on reflection, he is at least beset with a tinge of being ashamed that he did what he did.

Senator STEVENS. I just want the record to show that I had made an error yesterday in my comment.

Senator EAGLETON. Yes. I think the first one in the history of your chairmanship. [Laughter.]

Senator STEVENS. Yes.

Senator EAGLETON. I am going to tie up this one loose end and then I will yield to Senator Gore or any other Senator, Republican or Democrat, who wants to come or question, because I think I will be here quite a while. So, after I ask this one question or two, I will yield to you, Senator Gore.

Senator GORE. Thank you.

Senator EAGLETON. You can complete your line of inquiry.

Mr. Devine, yesterday in your testimony, you said that you had read a book about President Eisenhower and in that book there was a reference to Mr. Phil Young who had once headed up the civil service. Do you remember that part of your testimony?

TESTIMONY OF DONALD J. DEVINE, DIRECTOR-DESIGNATE, OFFICE OF PERSONNEL MANAGEMENT

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And you mentioned that in reading that book, Mr. Young had engaged in political-type activities. That was your recollection from the Eisenhower book. Do you remember that?

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[1] See p. 473 for a letter from Congresswoman Schroeder.

Mr. DEVINE. Yes. I said I was surprised or interested to see how involved he was.

Senator EAGLETON. Yes. Do you remember the name of the book that you read?

Mr. DEVINE. Yes. As I told your staff, it was by a fellow named Ambrose. It was called "Eisenhower the President," I believe.

Senator EAGLETON. Yes, we verified with your secretary that that is the book that you read, "Eisenhower the President," Stephen Ambrose, Simon & Schuster, 1984. It got pretty good reviews, by the way.

There is only one reference to Phil Young in the entire Ambrose book, and here it is. "At a mid-December Cabinet meeting, Eisenhower told Phil Young, a Columbia dean, who had taken over as head of civil service, that one way to get rid of a Democrat was 'transfer him around until he's sick of it.' " Eisenhower said that when he was Chief of Staff "We had a general who didn't want to retire. After we got through with him, he was ready!" He also told Young that it was "better to abolish a job than keep an opponent in it."

Nothing from the book, indeed nothing from conventional knowledge, on the career of Mr. Phil Young gives the slightest indication that he campaigned in a wholesale variety for a slew of congressional candidates across the country. Nothing in the book—I repeat, this is the sole reference to Phil Young in this Ambrose book—indicates that he was in any degree as politicized, as intensely politicized, as you have been.

Having read this Young quote to you, do you compare, in your own mind, that one excerpt of Phil Young as being analogous, in whole or in part, to your 4-year tenure as head of OPM?

Mr. DEVINE. I am glad that you raised that, actually. I think if you check the record——

Senator EAGLETON. I knew you would be prepared on it, because we talked to your secretary, and any good secretary will warn you.

Mr. DEVINE. There were actually two citations, and if you check, you will find only one was listed.

Senator EAGLETON. What did that say? Your staff checked it. Your secretary checked it. It doesn't serve your purpose.

Mr. DEVINE. I didn't look back.

Senator EAGLETON. How many of your associates are here with you today? Have you got the same body of 30?

Mr. DEVINE. I have no idea.

Senator EAGLETON. Could one of them be dispatched to talk to your secretary and get the other Young quote from the Eisenhower book? You have got your whole army here. Can one of you——

Mr. DEVINE. It is at home, and I wouldn't ask them to go home.

Senator EAGLETON. I will dispatch someone, then, if you can't afford the talent, and we will get the book and we will have it later in today's hearings from the Library of Congress and see what this other Young quote was.

I know damn well that it has nothing that serves your purpose.

Mr. DEVINE. I didn't go back and look at it. It had nothing to do with campaigning, as I remember, but the quote makes precisely my point. I don't know how one can compare going out doing public campaigning to moving people around to wear them out through reassignments. One is a prohibited personnel practice, and the other is out front, clearly legal, as nobody has questioned, and to me, straightforward out front. That is what I tried to do.

Yesterday, you raised the issue and, as I say, I am glad you did. I did a lot of research. I'm a professor, and I haven't done this for a long period of time. But you raised Theodore Roosevelt as kind of the model and the paradigm for dealing with the civil service and my office. There are some interesting parallels. In fact, Theodore Roosevelt has always been a model of mine. His biographer, Joseph B. Bishop, said that

> Roosevelt made frequent addresses in various parts of the country explaining and expounding his acts and policies and contributed promptly to the newspaper the various replies to all attacks of consequences made through their column.

Before long,

> He had won the support of all the more reputable and influential newspapers in the country and had secured both the intention and the confidence of the great body of public intelligence dealing with this issue.

I went back to the correspondence of Theodore Roosevelt with Henry Cabot Lodge. I have a letter addressed on Civil Service Commission stationery dated October 28, 1891, in which he refers to an article, an editorial from the New York World, and he said, "I enclose * * * I am very pleased with" it, since it "prevents there being any doubt as to my position." The editorial is attached. It says,

> Civil Service Commissioner Roosevelt has disclosed what he is here for. It is not to secure respect for the law, which he has sworn to execute, nor to prevent the blackmailing of public servants by their official supervisors. It is not even to repeat threadbare homilies on civil service reform. Mr. Roosevelt is here to help promote the election of Boss Platt's Mr. Faslett.

In another letter on Civil Service Commission stationery dated January 26, 1891, it says,

> Dear Cabot, I have been thinking over your request for me to speak in Massachusetts this fall. I would prefer not to. Remember that when I speak, I have got to make up my mind that unfavorable comment upon me and, therefore, upon the Commission will follow, and I have to weaken myself a certain amount with the already overwhelming Democratic majority in the next House. I am perfectly willing to do this for an object * * * Of course, if you make a dead point of it, I will come.

The third letter on his personal stationery, dated September 25, 1892, is,

> Dear Cabot, Even in the West, I saw by the occasional notices in the papers that you are getting the Republican machine into fine condition in Massachusetts.

He goes on, and later he says,

> I passed a very pleasant 3 weeks on my ranch and on the trip South to Deadwood, shooting three or four deer and antelope. * * * In Deadwood, I was enthusiastically received and opened the Republican campaign by speaking to a really large audience in the fearful, local opera house.

The fact of the matter is, Theodore Roosevelt was a very active campaigner. But he also is the one who, quite correctly, as you mentioned, wrote the book on civil service and is the man who said that "no political influence will help you in the least."

The fact of the matter is, he kept a proper balance between the representational function of his office and his duties over the civil service system.

Unlike what has happened through most of the history of the civil service, where, in fact, as you quoted yourself from the book, the thrust had not been out front raising the issues and dealing in campaigns, but the inevitable thrust has been to go in and to pollute the civil service system; to transfer people around; to do red tagging; to give appointments to careerists: to set up people that had joint responsibility for both the civil service and White House personnel; to have clearances done in the White House, the supergrade positions during the Kennedy and the Johnson and Nixon years.

I think I offer a very different kind of record than that history. And I think, started by my predecessor, Mr. Campbell, that we put out front the political part, and we stopped fooling around with the career system. That's our job.

Senator EAGLETON. I agree with part of what you said, that you offer quite a contrast to Theodore Roosevelt.

When you recited those excerpts from the Bishop biography—it is a very good one—when you said, writing to Senator Lodge, he, of course, declined to campaign for Lodge. There is absolutely no problem whatsoever, if you were to give speeches, for example, to the American Bar Association, Baltimore Bar Association, Baltimore League of Women Voters, any nonpolitical group, explaining your policies. You could go to Kiwanis Clubs, Commerce Clubs, Chambers of Commerce, explaining your policies and your policies are much different than what policies were in the past, and you could explain why it is that you have tried to initiate policy changes. You could write open-end pieces to the Washington Post. You could write articles for magazines. Later on in our anthology, we are going to get into one of your articles.

You can, as a public servant, use communicative means, forums, et cetera, to explain your point of view. It is not a question of trying to strangle you, put a gag on you, so that you can't explain anything you are doing.

But I submit, except in your recital there, of the one when Theodore Roosevelt appears in Deadwood, wherever the hell Deadwood is, what Mr. Roosevelt was doing in his exchange of letters with Lodge, et cetera, was explaining his point of view.

You have the right to write Congressmen. We are going to get into some of those letters later. You have the right to write a letter to a Governor. I will query the content of one of your famous letters to a Governor, and we will get into that later. But it is a vastly different thing for you to get intensely, repeatedly involved in a whole host of political campaigns, immersing yourself into the North Carolina Senate race, very deeply, with multiple appearances, plural, in North Carolina, than those excerpts that you read from the Bishop biography of Theodore Roosevelt.

Curious it was that you had Senator Helms here to introduce you yesterday, curious. Somehow, in his own mind, he must have been grateful for your appearances in North Carolina. Curious it is that a longtime resident of Maryland, a professor in Maryland, erstwhile candidate for public office in the State of Maryland, couldn't bring with him one Maryland congressional person to introduce you; couldn't bring with him the senior Senator from the State of Maryland, a Republican, Senator Mac Mathias, or either one or both of the two Republican Congresswomen in the House of Representatives, Marjorie Holt or Mrs. Bentley.

He didn't bring anybody from home. You brought the Senator from North Carolina. I guess you could have brought some of those other candidates that you supported around the country, winners or losers, we will get into that, because they are somewhat in your debt for your active campaigning.

So, yes, you read from the biography of Theodore Roosevelt. Rest assured, Bishop will never do a biography of you, and a biography of you, whenever done, will never put you even in the smallest part of Theodore Roosevelt's shadow.

Senator **STEVENS**. Senator, I think that the rules require that we indicate that the comments on Senators or witnesses cannot go into the personal vein, and I would urge you to respect that tradition in the Senate.

Senator **EAGLETON**. Well, my statement will stand, Mr. Chairman. You can decide how completely or how inadequately Mr. Devine falls in the Roosevelt shadow.

I yield to Senator Gore.

Senator **GORE**. I want to thank my colleague for yielding. I have some questions to pursue on the Federal Employee Health Benefit Program, but before that, I would like to follow through on a couple of the questions about politicizing the office.

The number of political appointees at OPM has increased rather dramatically since you took over. Figures published by the administration comparing Schedule C appointments in 1980 with Schedule C appointments in 1984 indicate that you have increased the number of political appointees, in fact, you have doubled it. You have increased it over 100 percent to 3,000 positions. Why have you done that?

Mr. **DEVINE**. I assume that you are referring to Governmentwide statistics and not at OPM?

Senator **GORE**. These are Schedule C appointments under the control of OPM which have increased by 240, and these figures do not include 1,200 other positions the President has reclassified as Schedule C that remain under the control of the White House.

So, the total would be an increase of 100 percent.

Mr. **DEVINE**. I have no idea where a figure of 3,000 Schedule C's comes from. It's not accurate. According to my last figures, which are a little out of date, September 1983, there were 1,646 Schedule C positions.

Senator **GORE**. Under the control of OPM?

Mr. **DEVINE**. They haven't gone up that much since then.

Senator **GORE**. What was that figure in 1980 in that category?

Mr. **DEVINE**. 1,566.

Senator **GORE**. The figures we have are 1,440 in 1980 compared to 1,682.

Mr. **DEVINE**. 1,438 is July 1979; September 1980, 1,566.

Senator **GORE**. Tell me again what it is at the present time?

Mr. DEVINE. 1,646 were as of September 1983. It looks like someone has just handed me—as of January 1, 1985, 1,682. So, hardly any change since the figure I have.

Senator GORE. Well, 200. Let me see. What was it on January 20, 1981? Do you have that?

Mr. DEVINE. I really have only the July and September figures.

Senator GORE. We have the other figure, and yours are fairly close, but the figure we have is 1,440.

Mr. DEVINE. That is close enough to the July 1979 figure.

Senator GORE. All right, 1,440 increased to 1,682. So, it is an increase of roughly 240.

Mr. DEVINE. Yes, sir.

Senator GORE. Political appointments in OPM.

Mr. DEVINE. No, no, this is not in OPM. These are authorities that we grant the whole Government. That's the total number of Schedule C's in the whole Government.

Senator GORE. That doesn't include positions that have been reclassified by this President as Schedule C, that remain under the control of the White House?

Mr. DEVINE. There are no Schedule C's that are under the control of the White House that I'm aware of.

Senator GORE. Has the administration reclassified a lot of positions as Schedule C that were not formerly Schedule C?

Mr. DEVINE. Not a lot. The only thing that I am aware of that the White House did actually took place before I was confirmed, when several positions were transferred from Schedule A to Schedule C by Executive order. But it was a relatively small number of positions.

Senator GORE. Well, the total ends up to doubling the number of Schedule C appointments.

Mr. DEVINE. Not according to my figures. Even using your 1,440, there is 46.

Senator GORE. No, I am adding to the 1,682 another 1,200 positions that were reclassified as Schedule C, and that brings the total, when you add the 1,682 and the new 1,200 political appointments.

Mr. DEVINE. No, sir.

Senator GORE. It brings it up very close to 3,000 positions?

Mr. DEVINE. No, sir. The figure is 1,646 by my numbers or 1,682 or whatever; it is around 1,600. There are no hidden Schedule C positions. That is it.

Senator GORE. Let me supply this information for the record, and the total is—this was provided, let me say, by the House Subcommittee on Civil Service—and the total number of Schedule C appointments, the total number of political appointees has gone up, according to these figures, from 1,439 under the last President, to 2,978 under this President.

Mr. DEVINE. Well, I think I might be able to clear up some of that. You are apparently using the Schedule C positions as the base period number, and then adding to it the noncareer Senior Executive Service positions, the Presidential appointments without Senate confirmation, the Presidential appointments with Senate confirmation.

Senator GORE. No.

Mr. **Devine**. I get 2,788 with all those categories.

Senator **Gore**. No, we are not using the SES. That was also increased from 518 to 744, and that will be reflected in these numbers that I will put in the record.

Without objection, Mr. Chairman, I would like to put these in the record and give them an opportunity to comment on them.

Senator **Stevens**. I think we could get this thing clarified for the record. It is a matter of statistics.

Senator **Gore**. Well, it is a matter of statistics, but it is also a matter of politicalization if the statistics I am using are, in fact, accurate. It would then reflect a doubling of the number of political appointees since you have taken over the Office of Personnel Management.

Mr. **Devine**. Well, I can absolutely guarantee that is not so.

Senator **Gore**. The figures will be in the record, and we will give you a chance to comment on them, and we will come back to them.

Again, these figures were provided by the House committee.

[The information referred to follows:]

U.S. OFFICE OF PERSONNEL MANAGEMENT

Schedule C Authorities—Governmentwide Totals

[Number of Schedule C's occupied]

Date:	
Mar. 31, 1976	939
June 30, 1976	934
Sept. 30, 1976	911
Dec. 31, 1976	885
Sept. 30, 1976 thru Aug. 22, 1980, an increase in Schedule C authorities of over 41 perecent.	
Mar. 31, 1977	769
June 30, 1977	808
Sept. 30, 1977	1,061
Dec. 31, 1977	1,214
Mar. 31, 1978	1,370
June 30, 1978	1,421
Nov. 13, 1978	1,487
Feb. 5, 1979	1,485
May 4, 1979	1,488
Aug. 3, 1979	1,439
Nov. 9, 1979	1,438
Feb. 21, 1980	1,471
May 14, 1980	1,518
Aug. 22, 1980	1,566
Nov. 25, 1980	1,518
Aug. 22, 1980 thru Oct. 20, 1984, an increase in Schedule C authorities of only 5.6 percent.	
Feb. 27, 1981	1,076
June 16, 1981	1,046
Sept. 30, 1981	1,073
Dec. 4, 1981	1,236
Mar. 5, 1982	1,256
June 30, 1982	1,421
Oct. 30, 1982	1,495
Dec. 31, 1982	1,615
Apr. 29, 1983	1,662
July 30, 1983	1,654
Oct. 21, 1983	1,646
Jan. 24, 1984	1,647
Apr. 17, 1984	1,623
July 20, 1984	1,665
Oct. 20, 1984	1,661
Jan. 18, 1985	1,682

NONCAREER APPOINTMENTS—EXECUTIVE BRANCH

	July 1979	September 1980	September 1981	September 1982	September 1983 [1]
PAS (with Senate confirmation): [2]					
Established	500	533	536	518	512
Filled	424	481	397	437	422
PA (without Senate confirmation): [2]					
Established	1	1	4	3	5
Filled	1	0	0	2	5
SES Noncareer:					
Allocated	826	829	822	733	803
Filled	[3] 766	[3] 799	467	648	696
Noncareer Executive Assignment (GS–16/18):					
Established	29	25	29	25	27
Filled	24	18	18	13	17
Schedule C (GS–16 and above): Filled	5	4	3	2	2
Schedule C (GS–15 and below): [4]					
	(11/79)	(8/80)	(9/81)	(10/82)	(10/83)
Filled	1,438	1,566	1,073	1,495	1,646
Total Filled	[3] 2,658	[3] 2,868	1,958	2,597	2,788

[1] Final.

[2] Figures on Presidential appointments do not include chief of mission positions in Department of State or White House staff positions.

[3] Includes 277 executives in July 1979 and 217 in Sept. 1980 who held noncareer appointments prior to the SES and who converted to the SES as career appointees based on prior career or career-type service.

[4] Figures on Schedule C appointments include only positions for which OPM exercises responsibility.

Presidential Boards and Commissions are considered part time; Congress creates these positions. White House figures are the number of bodies in and out (total appointments made). Thus the same individual will be counted separately for each new appointment.

Boards and Commissions:	
Jan. 21, 1977 thru Jan. 20, 1979:	
PA	792
PAS	232
Total	1,024
Jan. 21, 1981 thru Jan. 20, 1983:	
PA	1,083
PAS	302
Total	1,385

REPRESENTATIVE PAT SCHROEDER RELEASES ANALYSIS OF WHITE HOUSE FIGURES SHOWING THAT REAGAN HAS APPOINTED FEWER WOMEN THAN CARTER; TO HOLD PRESS BRIEFING AT 2 P.M. in ROOM 2410, RAYBURN HOUSE OFFICE BUILDING

Representative Pat Schroeder (D-Colorado), Chairwoman of the Subcommittee on Civil Service, today released a report showing that Ronald Reagan has named vastly more political appointees than did Jimmy Carter and his appointment of women lags far behind Carter's record. Using White House supplied documents, Representative Schroeder disproved the President's claim that he has appointed over 1200 women to executive level positions in his Administration; Schroeder said the accurate figure was 88. A copy of the report is attached.

Schroeder said that the documents provided to her by the Reagan White House indicate that Reagan has increased the number of Schedule C appointees by 107 percent over the Carter administration level; increased political appointments to boards and commissions 44 percent; increased political Senior Executive Service appointments by 44 percent; and hiked direct Presidential appointments by 14 percent.

"A rather remarkable growth in appointments from this avowedly anti-government President," Schroeder commented.

"A look at each category of appointee shows the Reagan administration falls short of Carter in appointing women to jobs at every level," Schroeder said.

Representative Schroeder will be available in her office, room 2410 of the Rayburn House Office Building, at 2 p.m. today, September 20, 1983, to answer questions concerning the report.

STATEMENT OF REPRESENTATIVE PAT SCHROEDER, CHAIRWOMAN, SUBCOMMITTEE ON CIVIL SERVICE, U.S. HOUSE OF REPRESENTATIVES, ON APPOINTMENT OF WOMEN BY PRESIDENT REAGAN, SEPTEMBER 20, 1983

Yesterday President Reagan called on those of us who have criticized his record on the appointment of women to stop "talking in generalities" and examine his record. Well, I have reviewed the data produced by the White House and can tell you that President Reagan has appointed vastly fewer women than President Carter. The data shows one other fact with clarity: the Reagan Administration has vastly more political appointees than the Carter Administration did. Both of these conclusions come from White House supplied documents.

President Ronald Reagan told a press conference on July 26, 1983 that he had appointed over 1000 women to executive positions in his Administration and that his record on the appointment of women compared favorably to that of President Jimmy Carter at mid-term. Since these revelations contradicted statistics released by the U.S. Commission on Civil Rights, I wrote the White House to ask for documentation.

On September 14, the President again told a news conference that his record exceeded that of President Carter and had White House personnel director John S. Herrington explain.

Finally, the next day, I received most of the documentation I had requested. Copies of it are available at the office of the Subcommittee on Civil Service in room 122 of the Cannon House Office Building.

The White House data shows two things: First, that President Reagan has made vastly more political appointments than President Carter. Second, President Carter appointed vastly more women, particularly to policy making positions, than President Reagan has.

There are two charts attached to the back of this statement. Chart #1 shows the staggering growth in the number of political appointees in the Reagan Administration. In terms of full-time presidential appointees, which includes both agency heads who have to be confirmed by the Senate and White House staff who do not, there has been a 14% growth in number of appointees during the first two years of the Reagan Administration over the same period of the Carter Administration.

Moving to the next column, you see a 44% growth in the number of political appointees to boards and commissions. This category includes, in the case of the Reagan Administration, 252 appointees who had to be confirmed by the Senate, such as the members of the Legal Services Corporation Board, and 1139 who did not, such as members of the Grace Commission.

There has also been a 44% growth in the number of Senior Executive Service positions held by other than career public servants. As you know, the Senior Executive Service was created by the Civil Service Reform Act of 1978 as a cadre of top career managers.

Finally, according to White House figures, there has been a 107% growth in the number of Schedule C appointees. Schedule C appointees are paid at the GS-15 level or below (GS-15, Step 1 now pays $48,553 a year). Schedule C appointees are appointed outside of the competitive service because their jobs have "a confidential or policy-determining character." Schedule C jobs include some mid-level speechwriters and policy analysts as well as numerous personal secretaries, drivers, and the like.

It is impossible to give you a precise cost estimate for this growth, but such figures are hard to calculate because we do not know how many days of pay have been claimed by those serving on boards and commissions. Excluding that category, the cost for the rest of the growth is $76 million a year, in salary costs alone. This figure is clearly too low, but it is impossible to be more accurate.

Chart #2 is quite straightforward. It shows the percentage and number of women appointees as of mid-term by President Reagan and President Carter. The single most important column is the first one which shows full time, Presidentially appointed, Senate confirmed individuals. Within this category are all the major actors in the government, such as Cabinet secretaries and Assistant Secretaries, Ambassadors, Judges and the like. The figures show that President Carter appointed women to 10.9% of these positions, while President Reagan appointed women to only 8.3%. Although President Reagan has made 7% more appointments to these jobs, the number of women has declined by 22%.

The next column refers to those people appointed by the President who are not confirmed by the Senate. The overwhelming majority of these people work in the White House office. Again, the percentage of women appointed to these jobs declined from 20.7% under President Carter to 16.9% under President Reagan.

The third column shows appointments to boards and commissions. Here the difference is most pronounced. President Carter appointed women to 31.5% of the positions on boards and commissions which he filled. President Reagan has only appointed women to 18.0% of these positions.

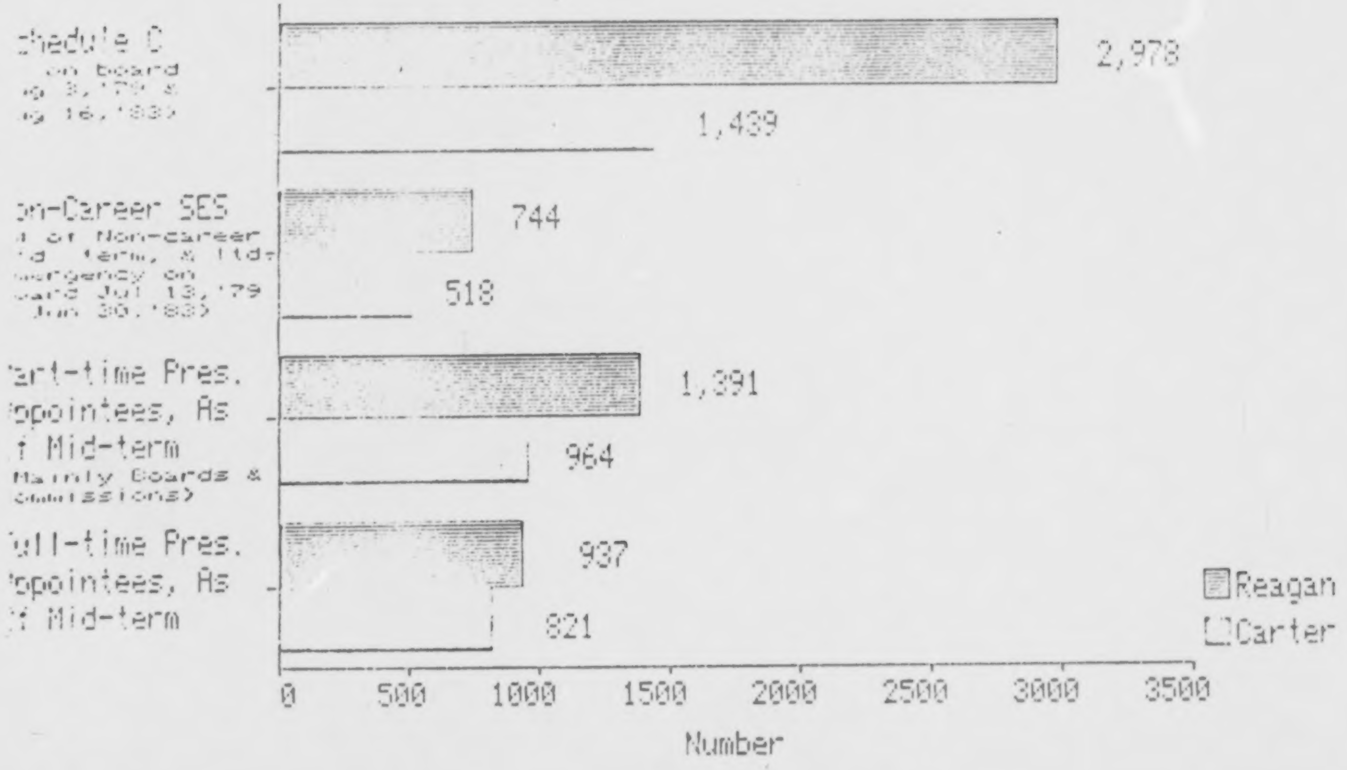
The final column gives the total numbers for Presidential appointments as of midterm. Unfortunately, the White House could not supply us with comparative data on Senior Executives or Schedule C's during the Carter Administration. Nevertheless, the data for all Presidential appointees shows that President Carter appointed 22.4% women and President Reagan has appointed 14.3% women. While President Reagan has made 30% more appointments than President Carter did during the same period, President Reagan appointed 18% fewer women.

Before concluding, let me deal with President Reagan's claim that he has appointed more than 1200 women to executive jobs in the Federal government, a claim he repeated yesterday. The White House got to 1200 by counting 584 female Schedule C's who are at GS-13, GS-14 and GS-15 and another 181 non-career SES members. Also counted in this figure are 329 women who serve part time on boards and commissions. Generally, when we talk of Executive Level positions in the Federal government, we are talking about those individuals paid under the Executive Level pay schedule, which runs from $63,800 to $80,100. The sad fact of the matter is that, as of midterm, there were only 88 women who held full-time executive level positions in this Administration.

I hold no special brief for Jimmy Carter. I was quite critical of his record in appointing women to his Administration. Nevertheless, the record of the Reagan Administration is much worse. No one should be misled by White House assertions to the contrary, no matter how often they are repeated.

Chart 1

Total Number Of Political Appointees



THE WHITE HOUSE,
Washington, DC, September 13, 1983.

Hon. CLARENCE M. PENDLETON,
Chairman, U.S. Civil Rights Commission,
Washington, DC.

DEAR CHAIRMAN PENDLETON: On July 28, your acting staff director wrote and requested additional details to support the President's statement at his press conference on July 26, that he had appointed women to over one thousand executive positions in his Administration. Your acting staff director in his letter also requested further specifics about the President's statement that the Reagan Administration's record of women appointments compared favorably to that of President Carter at mid-term. In an effort to help the Commission in its continued monitoring of equal employment opportunity in the Reagan Administration, we are pleased to provide you with the requested information.

The President's reference in his press conference to the more than one thousand women appointed to executive positions in his Administration encompassed direct full-time and part-time Presidential appointments, and non-career senior executive service and Schedule C managerial positions (at or above the GS-13 level, $34,930 per annum). As shown on enclosure five, the total number of women appointments thus far in the Reagan Administration is over 1,200 (as of January 16, 1983). To this Administration's credit, women have constituted fifty-seven percent of all Schedule C appointments (1697 of 2978) and fully forty percent of appointments at or above the GS-13 level (584 of 1460).

In order to demonstrate the accuracy of our comparative figures, extensive data is enclosed detailing the records of Presidents Reagan and Carter on appointments of women during the first two years of their respective Administrations.[1] All data have been uniformly tabulated and interpreted in arriving at the appointment totals for each President.

FULL-TIME APPOINTMENTS

A comparison of all full-time direct presidential appointments shows that President Reagan selected 4% more women during the first two years of his Administration than did President Carter (105-101).[2] When one excludes Federal judicial appointments, President Reagan's full-time women appointments are 9% higher than President Carter's (99-91). Moreover, these figures do not include ten women whom President Reagan had selected for full-time positions before January 21, 1983, whose names had not yet been announced pending completion of standard pre-appointment security and other clearances.

PART-TIME BOARDS AND COMMISSIONS

President Carter's female appointment totals for part-time boards and commissions are misleading. Nearly a quarter (23%) of Carter's female appointments to part-time posts were made to two commissions, created to deal solely with women's issues, which are now defunct. Excluding these commissions, the total number of Reagan women appointments to part-time positions in the first two years is 6% higher than Carter's (276-260).

Altogether, omitting judges and the aforementioned commissions, the total number of direct Presidential appointments of women made by President Reagan in the first two years of his Administration is 7% greater than the number made by President Carter during the comparable time period (375 to 351). Specific examples of President Reagan's appointments of women to significant positions show conclusively that he is far ahead of President Carter in selecting females to serve at the highest policy levels. As you know, he is the first President to have three women serving concurrently in his Cabinet, and the first to appoint a woman to the United

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[1] While much of this information had previously been compiled and reviewed by our Office, the computer records available to us from the Carter Administration were incomplete and inaccurate. In an effort to ensure a complete and accurate response, we undertook a thorough review of President Carter's appointments, based on original source material from the White House Executive Clerk, and computerized the resulting data.

[2] The enclosed summary of direct Presidential appointments of women during the first two years of each Administration covers persons in the following categories: (1) persons appointed to office (including those who have since left office); (2) persons who were nominated, but who were either withdrawn or had not been confirmed at the two-year point; (3) persons whose intended appointment had been announced, but who had not been nominated or appointed at the two-year point; and (4) full-time "holdovers" serving at the pleasure of the President.

States Supreme Court. On his own staff, he has appointed women to 24 senior (i.e., commissioned officer) positions, including two who have served as Assistant to the President for Public Liaison and the first woman ever to serve as Assistant to the President for Presidential Personnel.[1]

While we believe the President's record on appointments of women is impressive, it is equally as important that the Commission understand the philosophy that guides the President in making all his appointments. The President himself aptly summarized that philosophy in his address to the American Bar Association's Annual Meeting on August 1, 1983, stating:

"We aim for a cross-section of appointments that fully reflects the rich diversity and talent of our people. But we do not, and will never, select individuals just because they are men or women, whites or blacks, Jews, Catholics, or whatever. I don't look at people as members of groups; I look at them as individuals and as Americans. I believe you rob people of their dignity and confidence when you impose quotas. The implicit, but false, message of quotas is that some people can't make it under the same rules that apply to everyone else."

Finally, Chairman Pendleton, I would note that we have supplied to the Commission a considerable amount of information about appointments in this Administration. To assist us in reviewing our own appointments it would be helpful if you would forward copies of the Commission's requests to the Carter Administration for similar information and the dates you asked for the information. I would appreciate copies of all evaluations of the Carter Administration data that the Commission has done so that we can be certain all comparisons are accurate and fair.

Thank you in advance for your cooperation.

Yours truly,

JOHN S. HERRINGTON,
Assistant to the President
for Presidential Personnel.

Senator GORE. You had an Associate Director of OPM for Administration named George Nesterczuk. Is that how you pronounce it?

Mr. DEVINE. Yes, sir.

Senator GORE. And he was your Associate Director for Administration from January 1982 until August 29, 1982. Then he left to serve as the State campaign manager for a Republican Senate candidate in Maryland, and my question is: What conditions governed his departure and his return a few days before the election? Specifically, did he take a leave of absence, or did he resign?

Mr. DEVINE. He resigned, and there were no conditions.

Senator GORE. Did his name stay on the rolls?

Mr. DEVINE. It's possible for things to take time to get out of the computer system, and so forth. But he was officially separated.

Senator GORE. He didn't continue to build retirement benefits, et cetera, during that period of time?

Mr. DEVINE. Not if he resigned. You can't accumulate them if you have resigned.

Senator GORE. All right. Did you leave his position open?

Mr. DEVINE. I did not leave it open, but I did not fill it. [Laughter.]

Senator GORE. That is an interesting distinction.

Mr. DEVINE. The difference is, you can't leave it open, but you can not fill it.

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[1] Other positions for which President Reagan was the first to appoint a woman include Secretary of Transportation; U.S. Representative to the United Nations; Administrator of the Environmental Protection Agency; Chairman of the Federal Labor Relations Authority; Chairman of the Federal Mine Safety and Health Review Commission; Chairman of the Postal Rate Commission; Member of the Commodity Futures Trading Commission; Engraver of the United States Mint; High Commissioner for the Trust Territory of the Pacific Islands; Ambassadors to Austria and East Germany; and U.S. Marshal.

Senator Gore. Is that the difference between bending the law and breaking the law?

Mr. Devine. No, sir, that's the difference between following the law and not following the law. And I had no idea whether he was coming back or not. I was involved in many activities at that time. I just didn't get around to filling it. That's not unusual at all.

Right now, for example, our Inspector General position has been left vacant for several months. Of course, it is being filled on an acting basis as Mr. Nesterczuk's position was filled on an acting basis. That's the normal procedure in Government. You don't always fill a position immediately.

Senator Gore. But you put Mr. Nesterczuk back in the same position one day after the election when he had completed his duties as campaign manager for——

Mr. Devine. He came back, and he told me that he had given some consideration to going into the private sector, he had decided not to, and he would like to come back. Mr. Nesterczuk is the best manager in the Government, I think widely recognized by those who agree or disagree with him, and I would have been derelict in my duty if I did not get his services back when he came back and offered them again.

Senator Gore. Were you surprised when he came to you? Did he call you election day or the day after the election?

Mr. Devine. I don't recall what day it was. I wasn't surprised. I saw the campaign was losing. I suspected he might come back, and I was very happy to get him.

Senator Gore. You weren't out at the headquarters that night by any chance, were you?

Mr. Devine. I very well might have been.

Senator Gore. Did you happen to talk to him when the results came in?

Mr. Devine. I don't remember, but I may have.

Senator Gore. And his position wasn't kept open, it just wasn't filled during the time he was campaigning?

Mr. Devine. That's correct, sir.

Senator Gore. Let me turn to the employees health benefit program.

During the 5 years from 1979 through 1983, the level of the FEHB reserves, contingency and special combined, averaged some $600 million or about 14 percent of the annual subscription premiums. In fiscal year 1984, however, reserve accumulations more than doubled, rising from $900 million to $1.9 billion during the year.

The President's budget shows reserves being retained above the $2 billion mark through fiscal year 1986.

Why did the reserves increase so dramatically in 1984, and why are such extraordinary accumulations representing nearly a third of income from subscription premiums being retained?

Mr. Devine. Well, I'm glad you asked that, because this is a good example of the kind of good management that we have done at the Office of Personnel Management.

In 1981, you will be aware—those who were following this at this time—I was facing a $440 million short-fall in the Federal employees health benefit plan, and we were several weeks away from our open season. We had to make some quick decisions to put the system back on a sound financial basis.

We made those decisions in 1981. They were questioned in court. We prevailed in court. In fact, the courts gave us more power than our attorneys said that they thought we had when we went in. The reserves at that time were down to 6.8 percent—6.8, I think it says—6.8 percent, which was well below the 14 percent reserve that you correctly say is the ideal to be at. Obviously——

Senator **Gore**. I didn't say that.

Mr. **Devine**. Oh, you didn't?

Senator **Gore**. I didn't say that. I said that's what they averaged from 1979 to 1983.

Mr. **Devine**. That has been what they have averaged, and that is our rough goal that we believe in keeping there.

Senator **Gore**. Well, now, the——

Mr. **Devine**. The last 2 years——

Senator **Gore**. Go ahead.

Mr. **Devine** [continuing]. We have been slowly building up these reserves. We moved them from 6 percent to 7.3 percent by the end of 1982; moved them up to 16.9, approximately 17 percent, in 1983.

Why did they go up so much after that—from 11 to almost 30 percent, from the 16-percent level when they were approximately at the correct level of reserves? We can't fully say. I would like to say that it is my good management of that program that's primarily driven the reserves so high. But it is also due, in part, to a phenomenon throughout the health insurance industry—although ours is more pronounced than it seems to be in the private sector—that we have had extraordinary successful claim experience over the past year. Our actuaries cannot fully explain why it is so good, nor can the private sector. We believe it is important to prudent management of this system—so we don't send it back into the chaotic state that it was in when I found it—that we evaluate that claim experience this year. And as we negotiate the premiums next year, if that experience holds up, I have every expectation that we will be able, as a minimum, to keep increases down much below what the general increase of the CPI has been, and perhaps even lower than the 4 percent that we had last time; perhaps no increase or even a reduction.

I think what you have mentioned here is an important fact about how we moved the health system into a state in which we all can have satisfaction about how strong that system is.

Senator **Gore**. Well, I don't quite understand how anyone could equate good managment of a fund like this with 30-percent reserves. That keeps your premiums high and your benefits low. The Congressional Budget Office and the General Accounting Office recommend a level of between 4 and 6 percent.

Now, some private——

Mr. **Devine**. I don't think they are real responsible.

Senator **Gore**. Let me finish. Some private experts kick that up a little bit higher and say that the appropriate level is at 10 percent. But instead, you tripled the highest estimate by the private experts, and you have got it up at 30 percent. That is one of the principal reasons why the Federal employees have had their premiums raised so very high and the benefits reduced at the same time.

Mr. **Devine**. As a matter of fact, the premiums have been kept lower in increases in the FEHB Program since I have taken it over than they have been for any equivalent program on the outside.

Senator **Gore**. Since you have taken over, the premiums of some of the carriers, some of the top carriers, have gone up 90 percent. In some others, it hasn't gone up quite that much, but the average has gone up 50 percent.

Mr. **Devine**. About 30 of them, actually, reduced premiums, and the ones who have gone up are the ones who have not changed sufficiently to build in what we have suggested, which are deductibles, coinsurance and cost-saving devices that would reduce their premiums, too.

The fact of the matter is that there are tremendous bargains in our health benefits program. Remember, we don't tell employees what kind of coverage they can choose. They choose between scores of plans to decide what kind of coverage they want depending on how much premium they want to spend.

Senator **Gore**. Well, now, wait a minute. Have the average premiums gone up or down since you have taken over?

Mr. **Devine**. They have gone down much less than any increases in the private sector.

Senator **Gore**. Have they gone up or down?

Mr. **Devine**. They have gone up like everything.

Senator **Gore**. How high have they gone up? How much have they gone up?

Mr. **Devine**. Last year, I believe our increase was about 4 percent.

Senator **Gore**. Over the 4-year period, they have gone up; the average is about 25 percent, isn't it? And the big carriers?

Mr. **Devine**. Over 4 years, perhaps, yes.

Senator **Gore**. And the big carriers have averaged an increase of 50 percent since you took over. Isn't that correct?

Mr. **Devine**. That is why people have been moving out of those plans into ones that have more cost sharing.

Senator **Gore**. But the premiums have been going up and the benefits have been going down?

Mr. **Devine**. The benefits have not gone down materially since the past year we put in deductibles and coinsurances which I don't see as benefits at all, but rather, rational ways to share costs.

Senator **Gore**. There are ways to use words that obscure meaning. You are trying to dispute the fact that the benefits have gone down since you took over. They have gone down, haven't they?

Mr. **Devine**. The benefits are, in terms of what you want to call benefits—we have more deductibles and more coinsurance. If you want to consider that benefits going down, I'm not sure that's proper, but you can. But I will tell you that 1 million Federal employees or retirees have shifted to plans that had deductibles and coinsurance which were higher than we establish as a minimum. It's rational behavior on the part of employees that has changed the benefits.

Senator **Gore**. Well, they are shifting because they can't afford the premium increases that you forced in the higher option plans. That's why they are shifting. You are driving them into——

Mr. **Devine**. We kept the premium costs down. If we had allowed them to go up as much as they could have, we would have chased more people out of protection.

Senator **Gore**. Wait a minute. You said you kept the premium costs down. I thought we agreed a moment ago you pushed the premium costs up?

Mr. **Devine**. No; we kept them down relative to any comparable measure you want to make anywhere else.

Senator **Gore**. Maybe I just want to be clear on the difference between down and up. [Laughter.]

The premium costs have, in fact, gone up, right? I mean you said that a minute ago.

Mr. **Devine**. They have gone up, but less than—I will compare ours to anyone else's experience on the average, and 30 of them have actually gone down. We don't have a single plan like most companies do in the private sector, remember. You can choose between 20 or 10 depending upon the eligibility.

Senator **Gore**. Thirty have gone down, so that means 170 have gone up, right? I mean there are about 200?

Mr. **Devine**. It is something in that range, but the ones that have gone down are ones that have good numbers of people. You have seen changes like, for example, in Blue Cross, the number of enrollees has gone down in their high option and gone up greatly in their low option.

Senator **Gore**. And the average has gone up. And just to come back to this central point, under your management, the premiums that your employees have to pay have gone up rather significantly, and the benefits they receive in return have gone down rather significantly.

Now, what mainly accounts for this is management of the plan; specifically, the reserves have been bloated beyond any reasonable level—not to 6 percent, not 10 percent, but up to 30 percent.

Now, in light of the rising health care costs and the actions that have eroded benefits, I just cannot understand why the participants in this program should be asked to carry the burden of these enormous reserves.

The carriers hold above the $1 billion mark; a budgetary outlay and a drain on the Treasury.

And yet you have recommended holding the reserves above the $2 billion mark through fiscal year 1986 and keeping that at 30 percent instead of the level recommended by the General Accounting Office, the Congressional Budget Office, and private actuarial experts. Why do you want to go against all of the experts in this field and impose such an onerous burden on employees and continue the trend to have their benefits go down and their premiums go up? Why do you do that?

Mr. **Devine**. Senator Gore, I can tell you that this program is probably the best run program in the Government. It saved employees about a billion dollars in premiums that they saved by moving into lower cost plans. It saved the taxpayer about $2.1 billion. The reserves—any Congressman or Senator that wants to introduce a bill to cut these reserves is free to do it, but I say they do it at their peril.

Senator **Gore**. That is your job, Mr. Devine.

Mr. DEVINE. No; my job is to manage this system prudently and to be certain that when business decisions are made that they are proper business decisions. As a matter of fact, I did not recommend to the Office of Management and Budget that the reserves should be up that high. We are in a review committee with them right now, and we expect, as we go through the next negotiation process, as I mentioned, that it will significantly depress the increases as a minimum and probably will result in extremely small increases or maybe no increase at all.

Again, I open this up for anyone's inspection. How anyone can think that bringing a plan that was a half billion dollars in the red onto a sound basis as we brought it to through prudent and careful, intelligent management—I really can't understand that.

Senator GORE. Well, I've looked at the books, and what I see is a 30-percent reserve. Why?

Mr. DEVINE. Yes, that is what you see. For 1 year, we are going to look at the experience for 1 year, and if that experience holds up, you will see that go down around the 16-percent range and you will see that the employees and the annuitants will have benefited from that decision.

Senator GORE. Let me just insert in the record at this point, if I may—I ask unanimous consent, Mr. Chairman—the Federal Employees Health Benefits Fund Financial Statistics. This comes from OPM, and the lowest was never, as you said, a half billion dollars in the red. The lowest ending balance that it has had was for the fiscal year ending September 30, 1981, when it was $271,000—$271 million, I am sorry, these are in thousands—$271 million was the lowest ending balance that it ever had for a fiscal year, so that conflicts with your statements earlier, and if you want——

Mr. DEVINE. Well, the net income from the profit and loss statement will show a loss of $442,090,000.

Senator STEVENS. Senator, your request to put the statement in the record will be granted.

[The information referred to follows:]

FEDERAL EMPLOYEES HEALTH BENEFITS FUND FINANCIAL STATISTICS

[In thousands]

	Fiscal year—							
	Ending Sept. 30, 1979 actual	Ending Sept. 30, 1980 actual	Ending Sept. 30, 1981 actual	Ending Sept. 30, 1982 actual	Ending Sept. 30, 1983 actual	Ending Sept. 30, 1984 actual	Ending Sept. 30, 1985 estimate	Ending Sept. 30, 1986 estimate
Income:								
Employees withholdings	$850,029	$892,057	$1,008,056	$1,230,404	$1,273,258	$1,371,688	$1,415,379	$1,524,978
Annuitant withholdings	410,075	462,751	569,265	735,816	934,530	1,120,767	1,188,200	1,297,903
Subtotal: Enrollee withholdings	1,260,104	1,354,808	1,577,321	1,966,220	2,207,788	2,492,455	2,603,579	2,822,881
Agency contributions	940,100	1,037,466	1,184,274	1,344,215	1,599,247	1,811,690	1,889,424	2,033,404
OPM contributions for annuitants	555,981	654,120	812,921	969,590	1,219,606	1,397,918	1,486,139	1,632,263
Subtotal: Government contributions	1,496,081	1,691,586	1,997,195	2,313,805	2,818,853	3,209,608	3,375,563	3,665,667
U.S. Postal Service	441,047	464,746	556,287	639,413	777,577	884,276	927,944	1,006,135
Interest income	108,638	128,593	120,126	99,019	133,667	216,887	292,093	324,617
Total income	3,305,870	3,639,733	4,250,929	5,018,457	5,937,885	6,803,226	7,199,179	7,819,300
Expenses:								
Premiums paid to carriers:								
Semimonthly	3,074,262	3,376,096	3,971,926	4,730,226	5,326,774	6,221,497	6,641,428	7,205,000
From contingency reserve	88,048	148,495	212,927	254,954	190,580	353,662	67,000	268,000
Net carrier activity	42,090	207,729	500,464	(50,104)	(139,455)	(776,026)	274,540	122,281
Other (including administration)	6,796	7,465	7,702	6,354	7,958	7,317	7,922	8,717
Total expense	3,211,196	3,739,785	4,693,019	4,941,430	5,385,857	5,806,450	6,990,890	7,603,998
Net income (loss)	94,674	(100,052)	(442,090)	77,027	552,028	996,776	208,289	215,302
Retained earnings—Equity:								
Beginning balance	718,735	813,409	713,357	271,267	348,294	900,322	1,897,098	2,105,387
Net income (loss)—above	94,674	(100,052)	(442,090)	77,027	552,028	996,776	208,289	215,302
Ending balance	813,409	713,357	271,267	348,294	900,322	1,897,098	2,105,387	2,320,689

Held by carriers (special reserves)	(360,772)	(52,550)	(13,670)	(52,550)	(240,788)	([1] 1,142,943)	(1,042,943)	(1,106,462)
Held by OPM (contingency reserves)	(452,637)	(660,807)	(257,597)	(295,744)	(659,534)	(754,155)	(1,062,444)	(1,214,227)
Retained earnings as a percent of payments to carriers	26.46	21.13	6.83	7.36	16.90	30.49	31.70	32.21
Net income (loss) as a percent of premium income	2.96	−2.85	−10.70	1.57	9.51	15.13	3.02	2.87

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[1] Estimated as of Nov. 15, 1984 by OPM for financial statement purposes. Revised actuarial estimate as of Jan. 7, 1985 is $1,103,243.

Senator STEVENS. I do want to make certain that I indicate at this point that I certainly disagree with you.

Senator GORE. All right.

Senator STEVENS. I have been through these problems with this program, and I would urge you to talk to some of the managers of the plans run by some of the individual employee units and groups to realize the problems that they have come through in this period. We came through a period, in the late 1970's, of double-digit inflation that really made them very difficult to manage.

Senator GORE. Yes.

Senator STEVENS. Right now, the impact of having the reserve is a result, in my judgment, of the reduction in the number of claims as the country becomes more aware of the concept of wellness and the concept of trying to practice preventive medicine. We are seeing, really, an impact across the whole spectrum of care in the health delivery system.

But above all, I would not want the record to show that this committee, at least from my side of it, is critical of having reserves at the levels that are there now. They reflect two things, in my judgment: One is the claims experience and the second is the fact that the inflation rate has been held below what was predicted.

If either of those changes, neither of which is completely within the control of Dr. Devine, those reserves would evaporate rather rapidly. I think it is prudent management to be prepared for a change in either one of those indicators.

Senator GORE. Well, Mr. Chairman, I have too much respect for your knowledge of these actuarial matters not to pay close attention to your words. I appreciate you putting these figures in the record, because I think they do indicate that there was a surplus ending balance for every one of the years.

Senator STEVENS. I do remember, Senator, the problem in 1981, in particular, when we all sweated over what was going to happen if that fund ran out.

Senator GORE. Yes.

Senator STEVENS. We predicted, in about the middle of fiscal year 1980, as I recall, that was the problem. I was on the other side of the aisle, the minority at that time, but we were all worried about what was going to happen to that fund and how the OPM was going to handle it. Dr. Devine, as I recall, came in the middle of fiscal year 1981, when the lowest balance occurred, and it was a difficult year.

Senator GORE. Well, let me finish what I started to say, which is that I did not mean to imply by using these figures that there were never any problems with the fund. I understand that fact very well, and I know that you were in the forefront of efforts to try and make sure that it was secure. I'm not disputing Mr. Devine's statements that there were problems with the way this fund has been run in the past. There is no question about that.

But I do disagree with him and with you, Mr. Chairman, if the statement is that a 30-percent reserve is good management. I don't think it is. I think that it puts an unnecessary burden on the people who are participating in these programs. It keeps the benefits low and the premiums high, and I don't think there is any justification at all for a 30-percent reserve, and I am comforted by the fact that the General Accounting Office and the Congressional Budget Office and many private actuarial experts agree.

I can understand how unexpected trends can suddenly cause an increase in reserves. What I can't understand is when the reserves get up to the 30-percent level, we are giving a recommendation that we keep them at the 30-percent level. I think that puts an unfair and completely unnecessary burden on Federal employees.

Mr. DEVINE. Well, I appreciate you raising that, and I would like to clarify that. Although the budget does show a 30-percent figure running for 1985 and 1986, I do not expect that that will continue in 1985 and 1986. We put them there to be the most prudent figure, but I suspect that we'll change that substantially in the next budget.

Senator GORE. So you plan to see those reserves come down?

Mr. DEVINE. Yes, sir.

Senator GORE. What will you do with them, then?

Mr. DEVINE. They will go into reducing premiums, primarily.

Senator STEVENS. Reducing premiums or reducing the rate of increase of premiums.

Mr. DEVINE. I stand corrected, reducing the rate of increase in premiums, at least, but it's possible it might, in fact, get to be a reduction.

Senator GORE. Let me ask you about another aspect of the health program. Even though the carrier-held portion might earn a higher rate of return in some units, this doesn't seem to justify increasing the drain on the Treasury in light of our high deficit problems.

Your management report for fiscal year 1986 reminds us that "the Government must maintain strict financial control over its operation" including proper timing of payments and "keeping funds in the U.S. Treasury until actually needed for disbursement."

In other Federal benefit programs, such as Medicare, Medicaid, Aid to Families With Dependent Children, et cetera, letters of credit or other mechanisms are used to secure Federal funds, to cover cash disbursements as needed, without the need for non-Federal entities to hold cash surpluses. Why should FEHB be exempt from the financial management controls that are imposed on all of these other programs?

You are holding a billion of it outside the Treasury. One could argue, from a statistical, managerial point of view, that this increases the budget deficit by $1 billion.

To some extent, you have already answered the question by acknowledging that you want to see that come down, but the policy question is a slightly different one. Why should FEHB be managed so differently from Medicare, Medicaid, AFDC, et cetera, where the instruction is, and the mandate is, to keep it within the Federal Government until it is actually needed?

Mr. DEVINE. That's our policy, too. It's a question of a judgment as to how long you can hold it in and how long you can hold it out. And again, I plead guilty to the charge of conservative management of this program given the fact of the circumstances we had back in 1981 where we did have a $442 million shortfall in the profit and loss sense. You are correct on the reserve side, but those are extremely low reserves for a fund this size.

I think the question is a good one, and I think, I mean I say that our policy is to hold it as long as we can. We have made some improvements on that, but we can always improve, and we are looking for ways to hold the money as long as we can.

I think it is very important that we manage our cash flow better than we have in the Government. We made some improvements, but we still have a long way to go.

Senator GORE. I want to assure you that I do not mean it personally, in any way, when I say that I think there is a distinction between conservative management and poor management. And in this case, I think that poor management is involved. OPM refused to ask for a routine supplemental in 1981 to cover the shortfall as agreed with the previous administration. You created the problem by saying that the deficits of the last administration required OPM's rejecting the idea of requesting a supplemental.

Now, I don't think it is conservative at all to increase the deficit by $1 billion dollars and lead to a situation where employees' benefits have to go down and premiums have to go up. I am comforted somewhat by the fact that you see the need for changing this approach, and I hope that you will follow through on this. I want to give you a chance to respond to that, but I would really like to go on to another matter. If you want to respond, go ahead.

Mr. DEVINE. No, that's fine.

Senator GORE. Now, are Federal employees who are covered under the FEHB Program covered for organ transplant surgery such as liver, heart, or pancreatic transplants?

Mr. DEVINE. I do not know. As you mentioned earlier, there are about 180 plans. All of them devise their own mix of benefits except for very unusual circumstances such as existed in 1981. Our basic policy is to allow carriers to devise their own mix of benefits and, in general, for us to let them decide what benefits structure they will have.

Senator GORE. We did not advise your staff about this in advance, so if you can provide a more detailed response to that first question for the record, I would appreciate it.

Mr. DEVINE. I would be happy to.

Senator GORE. On January 1, 1984, FEHB announced the following change in coverage: Experimental and investigational services would be excluded from coverage. Prior to this announcement, the standard used for coverage was, "in accordance with accepted professional medical standards in the United States."

Feel free to call upon whomever you want to ask for help in responding to this, but why was this change made? I have a strong interest in this matter, and I think that the Federal employees have really been mistreated by the change in policy.

Mr. DEVINE. Again, I think the critical fact to remember about Federal employees health benefit programs is that by and large, the carriers determine what their benefits structure will be. I will be glad to look into that, in particular, but I suspect that that was a particular plan that announced——

Senator GORE. It was the Blue Cross plan.

Mr. DEVINE. It was Blue Cross that made the decision to change their coverage, and our general policy is not to require that plans have to or don't have to offer any particular coverage. The whole philosophy of the Federal employees health benefit plan is to allow choice of different kinds of coverage to be offered and then have employees choose between those different mixes of coverage so that they themselves can choose the kind of benefit mix that they prefer.

Senator GORE. Well, in conversations with FEHB in 1983, it was explained to me that experimental and investigational services were specifically not excluded because it was not possible to develop a single, national, medical standard. It was just common sense to allow local plans to determine what was accepted care in their service area. Attempting to establish a nationwide standard of what constitutes experimental care would result in adopting the lowest common denominator of care.

Do you know what changed that? I guess your response is that the Blue Cross took the initiative to change that.

Mr. DEVINE. Almost certainly I am not familiar with the particular change, and I am pretty certain that if we ordered something of that kind of magnitude, I am pretty certain that Blue Cross must have changed it themselves.

Senator GORE. I would like you to check that and provide an answer for the record. I would like to explain to my colleagues why this is significant. By law, this particular plan, FEHB-Blue Cross/Blue Shield High Option, is used as a reference point for CHAMPUS. Many private insurance companies also look at the policy of the FEHB-Blue Cross/Blue Shield High Option before deciding on their own coverage policy.

I have been very interested in the policies surrounding organ transplants, and it created a lot of problems when the Federal employee health benefits program announced this change in coverage of experimental and investigational care.

Again, I am aware that you were not advised ahead of time that I was going to ask you the details of this, so if you want to respond further for the record, that would be fine.

Mr. DEVINE. I think that it is important, and I think you bring up a good question. There are changes in coverage that different plans do through FEHB, and somehow, that gets translated as if it were Federal policy. It can't possibly be Federal policy when we have a couple of hundred different plans offering different kinds of coverage. I appreciate this opportunity to be able to explain that the changes in benefits in the plans, except in the case of emergency or some particular cases, are generally left to the plan, again, under the principle that the basic idea of the FEHB program is to have competition between the benefits packages offered by the different carriers.

Senator GORE. I will look forward to your other responses on that for the record.

[The information referred to follows:]

EXPLANATION OF CHANGES IN BLUE CROSS/ BLUE SHIELD FEHB BROCHURES

1984 - Excludes services and supplies related to care which is experimental or which is not provided in accordance with accepted professional medical standards in the United States.(See page 19 of the attached brochure.)

1985 - Excludes services and supplies for or related to care which is experimental/investigative or which is not provided in accordance with accepted professional medical standards in the United States. (See page 28 of the attached brochure.)

The current Service Benefit Plan brochure language related to experimental/ investigative procedures was developed by Blue Cross/Blue Shield for the purpose of describing for enrollees more precisely services that would be covered, and those that would not be covered, taking into consideration the ever-changing developments in medical and surgical procedure that have occurred so rapidly since the early '70s. The language changes in 1984 and 1985 were made to be consistent with a concentrated Blue Cross and Blue Shield Association effort nationwide to further clarify for all their accounts, as consistently as possible, that services provided in accordance with accepted professional medical standards would be covered. The Blue Cross effort was intended to clarify coverage for procedures, including many organ transplants, when and where they become accepted practice while making it clear that coverage did not extend to experimental, investigative or non-medically related "services".

The specific language was initiated by BlueCross/Blue Shield and does not reflect an OPM imposed policy statement.

A Government-wide Plan
Administered by
Blue Cross® and Blue Shield®

Service Benefit Plan

ADDENDUM—Showing Plan Changes Effective January 1, 1984

ENROLLMENT CODES
High Option: 101, 102
Standard Option: 104, 105

Federal Employees
Health Benefits Program

Published and Distributed by the
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PLEASE KEEP THIS ADDENDUM—It is to be used with the Plan's 1983 brochure. The contents of the 1983 brochure, as modified by the changes listed in this addendum, constitute the official description of Plan benefits beginning January 1, 1984.

How The Plan Changes January 1, 1984

- Catastrophic Protection Benefits (pages 15, 16) are changed as follows: The High Option benefit is now $1,500 maximum out-of-pocket per calendar year. Formerly, the benefit was $1,000 Basic and $1,000 Supplemental. The High Option benefit now includes the $50 per admission deductible. The Standard Option benefit now includes the $100 per admission deductible.
- Outpatient Accidental Injury Benefits (pages 6, 12) for care received within 72 hours, are changed as follows:

  The High Option benefit for hospital and physician care is now 100% (UCR). Formerly, the physician care benefit was 80% UCR.

  The Standard Option benefit for both hospital and physician care is now 100% (UCR) subject to the calendar year deductible. Formerly, the benefit was 75% (UCR) subject to the calendar year deductible.
- The Standard Option Schedule of Dental Allowances (pages 8, 9) is increased by 10%.
- Outpatient visits (pages 17, 18), for other than mental illness care and home nursing care, are unlimited under both options. Formerly, there was a 50 visit maximum per calendar year under High Option and a 25 visit maximum per calendar year under Standard Option.
- Home nursing care benefits (page 18) for up to two hours per day are provided for up to 50 visits per calendar year under High Option and 25 visits per calendar year under Standard Option. Formerly, the visit limitation applied to all outpatient visits.
- Mental illness benefits are changed as follows:

  A High Option Inpatient Mental Illness Catastrophic Protection Benefit is added to provide 100% (UCR) after $4,000 maximum out-of-pocket per person, per calendar year including the per admission deductible. Formerly, High Option inpatient mental illness benefits (page 4) were limited to 60 days per calendar year.

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BRI 41-25

ENROLLMENT CODES
High Option: 101, 102
Standard Option: 104, 105

Service Benefit Plan

How The Plan Changes January 1, 1984—Continued

Hospital inpatient benefits (pages 4, 5) for mental illness care are now 80% for High Option after the $50 per admission deductible and 75% for Standard Option after the $100 per admission deductible. Formerly, member hospital benefits were provided at 100% for both options after the applicable inpatient deductible.

High Option inpatient physician care benefits (pages 10, 12, 16) for mental illness care continue at 80% UCR but are now subject to the calendar year deductible.

Outpatient visits for mental illness care benefits (page 18) are provided for up to 50 visits per calendar year under High Option and 25 visits per calendar year under Standard Option. Formerly, the visit limitation applied to all outpatient visits.

The Lifetime Maximum for mental illness care (page 16) now applies to inpatient care under both options and is increased to $75,000 under High Option. Formerly, the maximum applied to outpatient care only and was $50,000 under both options.

- This Plan's deductibles and coinsurances under both options (pages 4, 10, 15, 16) are waived only for subscribers who receive primary benefits under Medicare Parts A and or B. When Medi- care provisions require other carriers to pay first, the deductibles and coinsurances are not waived.

Brochure language is clarified as follows (clarifications are ***in Boldface Italics***)

Basic Hospital Outpatient Surgical Benefits—High Option—page 6

- The Plan pays in full in member hospitals, ***or in hospitals*** located outside the United States, Puerto Rico or Canada.
- Covered Hospital Services in connection with covered ***outpatient*** surgery and oral surgery

How High Option Benefits are Paid—page 13

- ***Local Plans compile*** usual, customary and reasonable (UCR) fee data (see page 25)
- ***Arkansas and the areas served by the Atlanta, Georgia and Worthington, Ohio Plans now have Blue Shield participating physicians for purposes of this Plan***
- ***Blue Shield participating physicians in Arkansas; Florida; areas served by the Atlanta, Georgia Plan; Indiana; Kentucky; and areas served by the Worthington, Ohio; Richmond, Virginia; and Charleston, West Virginia Plans accept the UCR payment as payment in full for purposes of this Plan***
- ***Blue Shield participating physicians in Missouri do not accept the UCR payment as payment in full for purposes of this Plan*** (Asterisk applies)

Exclusions—page 19 and page 20

- Benefits are not provided for services and supplies related to care ***which is experimental or which is*** not provided in accordance with accepted professional medical standards in the United States
- Benefits are not provided for services and supplies for inpatient alcoholism rehabilitation or ***drug abuse rehabilitation*** (not including detoxification)

General Information (page 26)

- The Social Security Act (Public Law 97-248, amended 1982 and applica- ble Regulations, including 42 C.F.R., Part 405) makes Medicare benefits secondary to benefits payable under FEHB plans for services furnished to employed individuals and their spouses age 65 through 69
- Public Law 97-377 (enacted December 21, 1982) makes the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) a secondary carrier. FEHB plans must now provide benefits first.
- For 1983, medically underserved areas now include Arkansas, Georgia and Wyoming. South Carolina is no longer designated a medically under- served State. This is subject to change

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U.S. GOVERNMENT PRINTING OFFICE: 1984-

Senator GORE. Let me just conclude my questions in this area by saying that when you look at the circumstances of Federal employees, a lot of people focus on pay and retirement, but for many Federal employees, the area of health benefits is just as important, if not more important. The changes that have occurred in this area have been extremely troubling and difficult for a lot of people. I don't think it has been handled very well.

I would like to go to another area, now, if that's all right. You let me know if I am abusing your time.

Senator EAGLETON. This is fine.

Senator GORE. This involves the PACE exam. You have stated in your answers to prehearing questions that you reduced the OPM budget by 17.5 percent and full-time equivalents by 18.8 percent since 1981, while providing a better level of service.

During this period, the PACE exam covered 120 different professional and administrative positions in the Federal Government. It was abolished as a result of a consent decree to eliminate adverse impact in hiring of blacks and Hispanics.

The PACE was the principal method for hiring external new employees at the GS-5 to 7 entry levels for professional and administrative career positions. PACE selectees were generally highly competitive college graduates. In fiscal year 1979, under the last administration, 4,606 external hires were made from the PACE exam.

Now, according to a recent GAO report, GGD-8518 for the record, dated December 10, 1984, most current GS-5 to 7 entry level vacancies in these occupations are filled by a variety of mechanisms. Internal promotions and transfers, other agency transfers, and Schedule B appointments.

Schedule B appointees can advance to higher than GS-9 level, but cannot be converted to higher career positions. They can be filled on an agency-by-agency basis using different recruiting and selecting procedures, with no Governmentwide application point. According to GAO, this could be subject to political or personal patronage. This internal transfer and Schedule B appointment process is simply not an adequate mechanism to hire career professionals.

From October 1982 through June 1983, out of approximately 26,000 GS-5 to GS-7 positions, about three-quarters, almost 20,000, were filled by promoting upward or reassigning current employees. Others were filled from other Federal agencies' displacement programs for Federal employees.

Only 1 percent, 5,354 positions, were filled from Schedule B. From July 1983 through December 1, 1983, 1,732 Schedule B appointments were made.

Since February 24, 1981, when the consent decree was made, you have been delaying, somehow, drafting or redrafting a legal and operable PACE exam. It has been since February 24, 1981. It is now April 1985, and you still have not redrafted a legal and operable PACE exam. Is that right?

Mr. DEVINE. That's correct.

Senator GORE. Why not?

Mr. DEVINE. Because we can't do it and meet the requirements of the decree. It's a shame. I opposed, when I was in the Office of the President-elect, the signing of the PACE consent decree. We tried to get standing in Federal court as the Carter administration was walking out the door and signed this consent decree. We could not get standing. I again raised the matter when we took office. The Justice Department did a thorough legal briefing and came to the decision that we were bound by the consent decree.

The consent decree tells us that we must devise an examination in which the proportion of minorities—the Hispanics and blacks—take the exam; they have to pass the exam. We cannot come up with an examination that will do that. As the Washington Post editorial said on the subject, "It's not a good solution, the one OPM has come up with, but it's better than any other alternative that they could come up with."

It's a sad thing for the merit system that we don't have a broad-banded PACE exam. I have decried the decree on many occasions, but I am legally bound by it. We have a replacement mechanism which does not satisfy me, but it does the job the best we can under the constraints of the decree.

It's of interest. I have been in this position for 4 years, and this is the first time that this issue has been raised publicly to my knowledge about the fact that we don't have a broad-banded college-level entrance exam in the Federal Government. I consider it a very sad point of my tenure as the Director of the Office of Personnel Management that we had to take this step. There is no other step that I know that could be taken under the constraints of the decree.

Senator GORE. Well, with all due respect, it seems to me there are plenty of steps. You could go back to court, ask for a modification of the decree. You could come back to Congress and ask for help from the Congress. It has been more than 4 years, and you still haven't done anything about this. Are you saying that the—that all of the—aren't State and local governments also covered by this?

Mr. DEVINE. No, sir.

Senator GORE. They are covered by similar decrees, are they not?

Mr. DEVINE. Not that I'm aware of.

Senator GORE. Well, I think the record will show that there have been similar decrees covering State and local governments and yet they have found a way to adjust to it.

Mr. DEVINE. I do not believe that's so.

Senator GORE. Well, we will have to check on that. I want to challenge you on that. It was my understanding that there have been similar decrees for State and local governments, but you may be right, and we will add something there for the record if you are right on that.

But my point remains that it has been more than 4 years. You didn't go back—did you go back to the court and ask for some modification of the decree?

Mr. DEVINE. Yes, sir. The administration went back after we entered office. We did get some modifications in the decree. Obviously, the plaintiffs, since they were satisfied with the original decree, were not willing to make any changes, but we did make some changes. But it didn't affect the essential problem that we are under.

Senator GORE. Why didn't you go back again, then? I mean, how can you wait 4 long years and say we are unable to hire college graduates and have a program like the PACE program? Why won't you do something about it?

Mr. DEVINE. I think this hearing is dependent on whether I will go back and ask for further modifications.

Senator EAGLETON. Do you pledge now to go back to court 4 years and 3 months later to seek an appropriate modification of the PACE decree? Do you make that pledge to this committee at this time?

Mr. DEVINE. I, of course, do not act in these matters all by myself.

Senator EAGLETON. Would it be your recommendation to the Justice Department or your own legal division that they pursue that as an efficacious remedy?

Mr. DEVINE. It has been my position, from the time I entered the transition and became aware of that, that we should fight this thing every step of the way, and I haven't changed my mind.

Senator EAGLETON. Do you make the statement before this committee that you will go back and make a recommendation to seek a modification of the PACE decree?

Mr. DEVINE. Make a recommendation within the administration?

Senator EAGLETON. Yes, the appropriate legal authorities that can file the motion?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. For rehearing?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You make that pledge?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Why didn't you do it earlier? Four years and 3 months since the event? Why did you wait until the time you are before this committee? The time now the whole world knows that college graduates cannot be hired by the Federal Government in an effective, proper way.

Senator STEVENS. Senator, I have got to say that statement is wrong, as is the whole line of questioning. It demonstrates that some of you haven't been attending committee meetings. [Laughter.]

Senator EAGLETON. Dr. Devine, who is up here on the hill frequently, just testified, Mr. Chairman, that during his 4 years' tenure in the office, he had never been asked about this subject matter. He is up here all the time.

Senator STEVENS. He was asked a question about the PACE exam in the committee's prehearing questions.

Senator EAGLETON. All right. He just, under sworn testimony, said he had never been asked about it.

Senator STEVENS. No, no, he was asked about it in the committee's prehearing questions.

Senator EAGLETON. Is your memory refreshed, Dr. Devine?

Mr. DEVINE. Yes, it was in the hearing questions. It wasn't asked verbally.

Senator EAGLETON. So you testified inaccurately when you said it was never asked.

Mr. DEVINE. I would like to correct the record that I wasn't asked verbally about it in my recollection. I suppose we are going to be careful here. Someone may have asked me about it. But I don't recall it.

Senator **Eagleton**. You are under oath. The truth is quite relevant in this room.

Mr. **Devine**. Yes, sir.

Senator **Gore**. If I could continue, first, Mr. Chairman, I want to plead guilty to never attending a meeting of this committee prior to this year. You have caught me on that. [Laughter.] But I would like to continue with the line of questioning, nonetheless.

Senator **Stevens**. I just don't think the record should indicate that the Federal Government is not hiring college graduates or that the OPM has not complied with the court decree. Unfortunately, they have not complied with the court decree, because it's not possible to comply with it the way it was crafted. As pointed out in the answer, they are trying to create separate examinations for 118 occupations previously covered by a single PACE examination that is no longer possible under the court decree.

Go ahead. We will take a recess at 3:30.

Senator **Gore**. Thank you very much.

Let me just clarify this point. My understanding is that you can hire college graduates, but Senator Eagleton's statement was qualified by saying that you can't do it in a proper and efficient way, in the way that was done before this examination was rendered inoperable by the consent decree. My criticism, again, is not directed at you personally, Mr. Devine. It is directed at the manner of your management of OPM, because for over 4 years, this very important program, which has a great deal to do with the future quality of the Federal work force, has been allowed to just drift. You haven't done anything to replace this important PACE exam. Now, you can make Schedule B appointments. You can have a separate exam. We have only been able to do about 4 or 5 out of 120. It is simply inadequate, and you haven't done the job that you should have in my opinion.

Let me tell you why I think it has been allowed to drift, OK? There was a GAO report on this. This GAO report, which I referred to earlier, says and quotes an OPM official as stating that the development of alternative examinations has been and may continue to be hindered by a lack of sufficient number of your own people due to the 50-percent reduction-in-force in 1982.

That is, the people who are in charge of developing the alternative examinations, the people who you would have to rely on to solve this problem, to help you solve this problem, go back, modify the consent decree, come to the Congress, make the—get the alternative examinations prepared, they are not there.

If that's not it, then it is just purely you, I would submit, and I will give you a chance to comment on that before I go on to my next question.

Mr. **Devine**. Thank you. I appreciate the opportunity to be able to set this in context. The examination, the general examination for college entrance before the PACE exam, was called the—in any event, we had another broad-banded exam. Between that time and the development of PACE, several years of work and research took place. I think with PACE, a sound examination was developed and could have withstood a challenge in court as did, by the way, my predecessor at OPM. His advice was not taken by the Carter administration Department of Justice on this matter.

It takes a long time to come up with a professional examination, and yet—and I must correct my statement. I had an old list of the examinations we had developed when I responded to the written questions. I would like to read for the record: We now have in effect examinations for a GS 110 economist, GS 334 computer specialist trainee, GS 526 tax technician, GS 670 bank examiner, GS 570 savings and loan examiner, GS 1145 agricultural program specialist, GS 1654 print management specialist, GS 1810 general investigator, GS 1811 general investigator, GS 1812 game law enforcement, Fish and Wildlife, GS 1816 Immigration inspector; we have under development a GS 105 special insurance claim representative, GS 993 special insurance claims examiner, GS 1102 contract and procurement, GS 1169 general revenue officer, and GS 1890 customs inspector.

The fact of the matter is, we have developed examinations in OPM under this kind of pressure much more than we ever have been able to in the past.

Senator GORE. You say you want to put it in context. Let me put it in context, too. As I found there, I think you completed examinations for about 10 occupations or less than that? Seven?

Mr. DEVINE. Eleven.

Senator GORE. Eleven occupations. There are 120, aren't there?

Mr. DEVINE. Yes, sir.

Senator GORE. So you have completed examinations for less than 10 percent of the professional occupations that have to be filled. You failed to do that, and at the same time, you failed to come in with any plan to rehabilitate the PACE style procedure.

Mr. DEVINE. Well, again, one has to remember that each of these examinations must have the same development and high quality as the PACE examination did, which took years under the previous administrations to develop. Just the one exam—which, of course, covered all the occupations—is what we want to do, to have one exam to cover a whole bunch of occupations rather than coming up with hundreds and hundreds of examinations. It makes no economic sense. But we are forced under the decree to have examinations that are related to specific occupations, unless we can get some changes made.

Senator GORE. So why are you cutting out the people who are working on it?

Mr. DEVINE. Well, since it has been so productive—my whole point from the beginning is, I know it is difficult to believe because of the common understanding—you can actually do more work with less people if you organize them better. And, literally, if you have too many people, they are bumping into each other and they are creating inefficiencies. If you have the right number of people, you can do a better job than if you have too many. That's how we have been able to cut 22 percent and been able to increase productivity.

Senator GORE. Well, you still haven't reached the 10-percent level for the examinations to hire college graduates to fill Federal jobs. You are still using this procedure that the GAO says is subject to political or personal patronage. You still haven't rehabilitated the PACE procedure, and the future of the Federal civil service, I think, is being jeopardized by the continued failure to do this properly.

Senator STEVENS. I think that this is a good time, Senator. We said we would take a short recess at 3:30. When we come back, if you don't mind, I will ask a few questions. You have had 1½ hours now between you and Senator Eagleton. I have some questions to set this record straight. I think that would be fair, don't you?

Senator GORE. Mr. Chairman, I think it is eminently fair, and I would like to thank you for the courtesy in giving me so much time and thank Dr. Devine for his responses to my questions. I will continue to follow this matter closely.

Thank you.

Senator STEVENS. Thank you very much. We will take a 10-minute recess, please.

[A brief recess was taken.]

Senator STEVENS. We can proceed again, if it is all right, please?

Mr. Devine, I will be brief. It is my understanding that the PACE consent decree was signed on January 18, 1981. You don't need to agree to that. I have just checked it. But can you tell us, is it true that the incoming administration had requested that that consent decree not be signed by the outgoing administration?

Mr. DEVINE. Yes, sir.

Senator STEVENS. And that decree has a timeframe of about 5 years, doesn't it?

Mr. DEVINE. Yes, sir.

Senator STEVENS. The impact of that decree, as I understand it, would be to impose on the Government the obligation to see to it that the number of people hired as a result of a particular examination was proportionate to the number of applicants in the case of Hispanics or blacks, is that correct?

Mr. DEVINE. Yes, sir.

Senator STEVENS. That, in effect, would require you to devise a system to compel the various agencies to hire those people in that proportion. You would have to have a magic formula, wouldn't you, to bring that about? It is not possible when you have separate independent employing entities to comply with that decree as I understand it. It that your opinion?

Mr. DEVINE. Well, each of the agencies is also named in the decree, so each of the agencies is also responsible to have the percent of applicants among blacks and Hispanics or selections proportionate to the applicants.

Senator STEVENS. If you have an employment opportunity, and you had one exam to cover that one opportunity, say, for instance, the hiring of stream guards in the Fish and Wildlife Service, then the number of blacks and Hispanics that are hired would have to be proportionate to those who were applicants, isn't that correct?

Mr. DEVINE. Yes, sir.

Senator STEVENS. That is the way you are complying with the decree now, are you not?

Mr. DEVINE. That is the way we are complying with it in terms of the examinations that we have issued. In terms of the Schedule B examinations, the agencies have the burden—since they are also applicants under, or defendents under, the decree—to assure that the proportion of blacks and Hispanics who take the examination is in proportion to those who pass it.

Senator STEVENS. You actually abandoned the PACE examination some time in 1982, is that correct?

Mr. DEVINE. Yes, sir.

Senator STEVENS. Let me go to the one other area that I did comment on, and that was the question of the amount of the reserve in the health program.

Can you give us an explanation of how the amount of the reserve has been accumulated? What, in your judgment, led to the increased level of the reserve?

Mr. DEVINE. I agree basically with what you have said. We have seen nationwide—Government and outside of Government—two major factors. First, a decline in the claims which may or may not be the result of not only the Government, but many, many private sector institutions, adopting more deductibles and coinsurance, also.

And second—as you correctly said, and I have not emphasized enough, but I'm certain it's correct—is that with inflation under control, it's now more—we're more able to calculate what the true costs are, where they were hidden when the inflation was going up, and I think that probably had a lot to do with it, too. So I think it's a combination of both of the factors that you mentioned with the deductibles and the coinsurance being kind of a subcategory of the first group.

Senator STEVENS. You indicated there is a negotiation coming up.

Mr. DEVINE. Yes, sir. One of the problems, of course, is that we get the claims experience about 18 months before we go into a negotiation, so we are always dealing with old claims experience. And that is why we thought it was prudent that we see this year's experience so we had more recent claims data to make a truly informed decision on this matter. And I appreciate your comments earlier. I know that you were intimately involved in this situation, and had some tough starts at the beginning of it.

But I think that we have weathered it, and the plan is in good shape now.

Senator STEVENS. All right. Finally, I want to put this in the record. I was one who favored the continuation of the bipartisan nature of the Civil Service Commission. The report that was issued by the Senate, at the time we considered the Reform Act in 1978, was S. Rept. 95-969. It was dated July 10, 1978. In that, the majority said, and I am quoting from page 5:

> The Civil Service Commission must now simultaneously serve as a management agency for a President elected through a partisan political process as well as the protection of the merit system from partisan abuse. The Commission serves, too, as a provider of services to agency management and in implementing personnel programs while maintaining sufficient neutrality to adjudicate disputes between agency managers and their employees. As a result, the Commission's performance of its conflicting functions has suffered. Expected to be all things to all parties, Presidential counselor, minority watchdog, employee protector and agency adviser, the Commission has become aggressively less credible in all its roles.

That was the main theme of the majority at that time. Senator Mathias and I disagreed. I want to put a series of quotes from the 1978 report in here. One says that "the Director of the OPM will be the President's chief lieutenant in matters of personnel administration."

It goes on to say that "both the Board and the special counsel will exercise statutory responsibility independent of Presidential directives. Absent such a mandate for independence for the Merit Board, it is unlikely that the committee would have granted the Office of Personnel Management the power it has or the latitude to delegate personnel authority to the agencies."

There is a whole series of statements in this report that indicate that the Office of Personnel Management is the arm of the President in matters of personnel administration.

So there was a decided deviation from the past as far as the 1978 bill. The views that Senator Mathias and I have expressed have been quoted here before, but I am putting a few of those in this record. It demonstrates that some of the things you are accused of are what the majority intended your office to perform, in my judgment.

I am one who believed that we should have preserved a non-partisan concept in terms of personnel administration and left it to Presidential assistants in the White House to continue the function that they had in the past in terms of personnel concepts.

I don't feel it is correct to criticize you for performing the function that the Reform Act intended to be visited in your office.

Mr. DEVINE. I appreciate that, especially since you do have a differing view of this matter. I think it is just indicative of the qualities that you have expressed as head of the Subcommittee on Civil Service over the past 4 years.

Senator STEVENS. Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Chairman.

Mr. Devine, let's clarify, if we may, a little of this business with respect to Mr. Nesterczuk. Is he a friend of yours?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Long-time friend?

Mr. DEVINE. Not an extremely long time, about 4 years or so.

Senator EAGLETON. Four years or so. Was he active in Maryland politics?

Mr. DEVINE. Yes, sir. He was my executive director for the State of Maryland for the Reagan Election Committee in 1980. Prior to that, he was—I forget the exact title—but when I was running the nationalities effort for the election campaign in 1979 and 1980, he was also working with me in that role. It was in both of those roles that I developed a great appreciation for his management skills.

Senator EAGLETON. So did you first meet him in 1979? Is that about right?

Mr. DEVINE. I would think so, yes.

Senator EAGLETON. And you were head of Reagan-Bush? When did you—it wasn't Reagan-Bush in 1978. [Laughter.]

What was your title then, and what were you doing in 1979 that attracted Mr. Nesterczuk to you and you to Mr. Nesterczuk?

Mr. DEVINE. As I mentioned, I was special assistant or executive assistant to the campaign manager. One of my duties was to——

Senator EAGLETON. The campaign, meaning the Reagan campaign?

Mr. DEVINE. Yes, sir. One of my duties was to recruit individuals in the nationalities division of the campaign.

Senator EAGLETON. OK. Has Mr. Nesterczuk ever been to your house?

Mr. DEVINE. I believe so.

Senator EAGLETON. Your wife said no. [Laughter.]

Mr. DEVINE. She was probably out at the time. [Laughter.]

Senator EAGLETON. I take it you call him George, that is his first name?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. He calls you Don?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. So you got to know him very well in 1979 as you were heading up the Reagan campaign, and he stayed with you as the campaign moved to the Reagan-Bush campaign in 1980, is that right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You were very close political allies in 1979 and 1980?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And you brought him with you to Government when you came into OPM, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And you made him, what is his title here, Associate Director of OPM for Administration?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. That is a very important position in Government.

Mr. DEVINE. Yes, sir.

Senator EAGLETON. It is under civil service, correct? It was when he served in that between January 1982 and August 29, 1982.

Mr. DEVINE. It's a noncareer Senior Executive Service appointment.

Senator EAGLETON. OK. You still live in Maryland?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Mr. Nesterczuk lives in Maryland?

Mr. DEVINE. No, he moved to Virginia. [Laughter.]

Senator EAGLETON. Did he in 1982 when he left the Senior Executive Service?

Mr. DEVINE. Yes, he still lived in Maryland then.

Senator EAGLETON. And you are a close personal friend of Lawrence Hogan?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. He was the Republican nominee for the Senate in Maryland in 1982?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Nesterczuk got to know Mr. Hogan. Did you perhaps introduce him to Mr. Hogan?

Mr. DEVINE. I may have.

Senator EAGLETON. We have information that you did, and Nesterczuk then became the manager of Mr. Hogan's campaign in the fall of 1982, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You want us to believe that when Mr. Nesterczuk left the Senior Executive Service on August 29, 1982, with 9 weeks to go in the Hogan campaign, that you had no understanding with Nesterczuk that he could come back to a safe home when Hogan went down the tubes?

Mr. DEVINE. Yes, that's true.

Senator EAGLETON. He just came in and said, "Don, I'm going over there with old Larry Hogan. We are on the road. Bye bye. Going out of Government service. Going back into politics. The way you and I were in politics, Don, back in 1979 and 1980. And I'm not coming back here." You're smiling.

Mr. DEVINE. I remember one of my most interesting assignments in 1976 was in your State, the State convention. You may remember, I don't know. I followed Republican politics. There were 150 delegates to the State convention in Springfield who were questioned by the other side, President Ford's group, as to whether they were bona fide delegates, and they called me in.

My job was troubleshooting campaigns, and after 2 weeks, we got them all certified, and the President thought, then Governor, it was his biggest win after North Carolina, where you may also see some connection with Senator Helms, as I have known him since then. So I have some very, very fond memories of politics in Missouri.

Senator EAGLETON. Well, that's wonderful. [Laughter.] I have some fond memories of politics in Missouri, too. [Laughter.]

That was a very obscure avoidance of my question. I asked you this question. Do you want us to believe, and I repeat it, that when George, your friend George, left on August 29 to head up the Hogan campaign, he came in, said "bon voyage," or words equivalent thereto, to his friend Don and said, "I'm going out there to run Larry Hogan's campaign in Maryland. I'm not coming back to Federal Government." And you, in turn, did not give him any indication that he would be welcome back the day after the election?

Mr. DEVINE. No, I did not. Or I guess your question is, do I expect you to believe it. I really can't say what you should believe. I can tell you what I did.

Senator EAGLETON. See, I don't believe it. It doesn't stand the test of credibility or the test of credulity. The day after the election your buddy, George, you are putting back on the Federal payroll. You were at Hogan's victory or defeat party rather, election return party election night?

You were a close personal friend of Larry Hogan's. You recommended Nesterczuk to Larry Hogan as his campaign manager.

Mr. DEVINE. As a matter of fact, I recommended against it.

Senator EAGLETON. Well, you discussed it with Larry Hogan, and you must have discussed it either calendar 1981 or 1982 while you were head of civil service. You were doing more politicking again, so you were discussing with Larry Hogan how to run his campaign and who ought to be his manager. Should it be Nesterczuk? Larry said, "Well, I know he did a lot of good work for you, Don, back there in 1979 and 1980."

And I think the test of reason said that Larry Hogan said, well, of course, Don, you will protect this guy. I'm not the favorite in this race. I am a considerable underdog. The polls are against me, and if we can get George off your payroll for a little 9 weeks and take a shot with this campaign and we will put him back on the day after the election.

That is credible. That's what happened. That's what happened, Mr. Devine.

Mr. DEVINE. You are entitled to your opinion.

Senator EAGLETON. Now let's move into calendar 1984. How many States did you campaign in for candidates for Congress or candidates for the U.S. Senate and specify the State.

Mr. DEVINE. I thought I had that information with me. I do not.

Senator STEVENS. Some of it is listed in the responses you gave the committee in terms of reimbursements.

Mr. DEVINE. It would all be. I was reimbursed for all of it. So I suppose you have the full record there.

Senator STEVENS. We will give you a copy of it.

Senator EAGLETON. All right, Mr. Devine. What States did you campaign in for candidates for Congress on the Republican ticket, whether incumbent or challengers, House or Senate, in 1984?

Mr. DEVINE. Schuette for Congress.

Senator EAGLETON. What's the name?

Mr. DEVINE. Schuette, Michigan; Helms for Senate, North Carolina; Cobey for Congress, North Carolina; Keating for Congress in Oklahoma; Blake for Congress in North Carolina; McMillan for Congress in North Carolina; Coble for Congress in North Carolina; Hendon for Congress in North Carolina; Shell for State Assembly in California; that appears to be it.

I do believe there were more, however.

Senator EAGLETON. There were more? What were they?

Mr. DEVINE. I believe I did a few in Maryland that I probably drove to myself so there weren't any expenses involved.

Senator EAGLETON. Maryland? Your home State?

Mr. DEVINE. Yes.

Senator EAGLETON. For what candidates of Congress or the Senate?

Mr. DEVINE. Helen Bentley and probably Marjorie Holt. I believe that was a fundraiser for her.

Senator EAGLETON. You drove to those events. You claimed no reimbursement expense?

Mr. DEVINE. Yes, yes.

Senator EAGLETON. Do you have a Government car?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. What car did you drive to the Bentley and Hogan——

Mr. DEVINE. My own personal car.

Senator EAGLETON. Your own personal car.

Mr. DEVINE. I have also been advised that there are some campaigns that have not yet reimbursed me, and therefore are not on the record.

Senator EAGLETON. I wondered about those.

Mr. DEVINE. In Pennsylvania.

Senator EAGLETON. I wondered about those. Tell us about those, then.

Mr. DEVINE. Curtis Weldon in Pennsylvania, and David Christian in Pennsylvania.

I would be happy—I thought I had the list with me—to submit the whole list if there are any others, but those are the ones that——

Senator EAGLETON. Is the list readily accessible in your office?

Mr. DEVINE. I thought I had the—my only list with me. I may, in fact, have lost it.

Senator EAGLETON. When did you lose it?

Mr. DEVINE. I don't know. As I say, I thought I had it with me. I will look. I'll find it. That's most of them.

Senator EAGLETON. That's most of them.

Mr. DEVINE. If not all.

Senator EAGLETON. Might there be others?

Mr. DEVINE. There might be if there weren't any expenses involved.

But I think that is—I think the rest have paid, have reimbursed, and therefore they would be on the record, so I would say this is all of them.

Senator EAGLETON. Did you see the list yesterday?

Mr. DEVINE. No, sir.

Senator EAGLETON. Did you see it this morning?

Mr. DEVINE. No, sir.

Senator EAGLETON. Why did you think you had brought it with you?

Mr. DEVINE. Because I carry certain things around with me that I think I might be asked about, and that was one of them. I thought I had it with me.

Senator EAGLETON. You seemed to specialize in North Carolina in 1984. Cobey for Congress, North Carolina; McMillan for Congress, North Carolina; Black for Congress, North Carolina; Hendon for Congress, North Carolina.

Senator STEVENS. Do you like pecans, Don?

Senator EAGLETON. And, of course, Helms for Senate in North Carolina. How many days?

Mr. DEVINE. The Republicans also picked up most of their seats in North Carolina. [Laughter.]

Senator EAGLETON. They did very well in North Carolina. They did very well. One has to wonder if you put more of your energy and talent into running OPM, maybe OPM would run a little better. You did very well for these candidates in North Carolina. You are a skillful politician, you are a skillful politician. You are regarded as a pro. People want you as part of their campaign. You are a good strategist. You can be an effective speaker. People respect your political advice and certainly those folks in North Carolina did.

How many days did you spend in North Carolina?

Mr. DEVINE. I can't recall exactly. Very few. Most of them were whirlwind kinds of things, stop here for a couple of hours, and so forth.

Senator EAGLETON. How did you get there?

Mr. DEVINE. Fly, paid by these committees as their reimbursements shows.

Senator EAGLETON. And fly back, of course?

Mr. DEVINE. Yes, sir.

Senator **Eagleton**. For instance, with respect to Senator Helms, how many days did you spend in North Carolina for Helms? How many speeches did you make? How many appearances did you make?

Mr. **Devine**. Well, I can say he had me working from the time I got off the plane to the time I got back on again.

Senator **Eagleton**. You are also known as a hard political worker. That's a given. Now, how many days did you spend in North Carolina for Senator Helms?

Mr. **Devine**. I believe there were two or three trips, 2 days or so per trip.

Senator **Eagleton**. Two or three, 2 days per trip. Were these shopping center rallies, or rallies in courthouses, or rallies in community halls?

Mr. **Devine**. It took all different——

Senator **Eagleton**. All different forms?

Mr. **Devine**. Yes.

Senator **Eagleton**. And you would fly down there and fly back? Did you stay in hotels?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. A night? Did you eat meals?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. You are a very economical traveler; 2 to 3 days, two or three trips, so that ranges between 4 and 6 days. That's three round-trip flights to North Carolina, lodging, food, and the Helms folks reimbursed you some $290?

Senator **Stevens**. I think he has reported six different lodging expenses there, Senator.

Senator **Eagleton**. He is huddling on the figure, Mr. Chairman.

Mr. **Devine**. Apparently there were—the reason they paid that is it was shared among all the candidates, all the expenses, and I also——

Senator **Eagleton**. That is part of the Helms operation in North Carolina, is it not?

Mr. **Devine**. No, not all of them.

Senator **Eagleton**. Wasn't Senator Helms very active in recruiting candidates for the House in North Carolina?

Mr. **Devine**. Yes; but he didn't win all the primaries down there.

Senator **Eagleton**. He didn't win them all, but he won some, didn't he, Mr. Devine.

Mr. **Devine**. Yes.

Senator **Eagleton**. So they had a sharing or a pooling arrangement? All right. How many trips did you make to North Carolina for candidate Cobey?

Mr. **Devine**. It looks like one.

Senator **Eagleton**. OK. How many trips for candidate Keating?

Mr. **Devine**. One.

Senator **Eagleton**. Same question for candidate McMillan?

Mr. **Devine**. One.

Senator **Eagleton**. Same question for candidate Blake?

Mr. **Devine**. One.

Senator **Eagleton** Same question for candidate Coble?

Mr. **Devine**. One.

Senator **Eagleton**. And, finally, candidate Hendon?

Mr. DEVINE. One.

Senator EAGLETON. Were these down and back, as you call them, whirlwinds?

Mr. DEVINE. They, I believe, were all on the same trip.

Senator EAGLETON. That is five, six congressional districts in one trip?

Mr. DEVINE. Yes, sir. As I say, we were up and down. I went through the Charlotte airport about three times in 2 days.

Senator EAGLETON. Two days for all 6, roughly, is that your recollection?

Mr. DEVINE. Yes.

Senator EAGLETON. And two to three trips for Helms of 2 days' duration?

Mr. DEVINE. One of those was coterminous with this group I did for the——

Senator EAGLETON. How many days did you spend up in Pennsylvania for candidate Wigdon or is it Wibbon?

Mr. DEVINE. Weldon.

Senator EAGLETON. Weldon?

Mr. DEVINE. I believe I was there twice, but not a full day in either case.

Senator EAGLETON. Twice?

Mr. DEVINE. One appearance each time, I believe.

Senator EAGLETON. You went twice up there for Weldon? How many for candidate Austin? There was another candidate in Pennsylvania.

Mr. DEVINE. Christian.

Senator EAGLETON. Christian. My handwriting is no good. Mr. Christian, a candidate in Pennsylvania.

Mr. DEVINE. I believe two. All this, I am sorry I don't have the details on. But the list——

Senator EAGLETON. The list you thought you had, that is lost?

Mr. DEVINE. We had all of this information carefully recorded, as is required, and it's all available. If I had been asked to submit it, I would have been happy to submit it.

Senator EAGLETON. You were rummaging around looking for it.

Mr. DEVINE. Well, I just had one summary sheet which would not have gone into detail, the number of times, and so forth, but just the campaigns I was in. But, obviously, all of this has to be recorded very precisely, and it all is recorded very precisely.

Senator EAGLETON. Well, Weldon and Christian weren't recorded because you said that they didn't settle in their recordkeeping?

Mr. DEVINE. Well, separate from the financial accounts, I obviously have accounts of my time, too.

Senator EAGLETON. Well, could someone on your staff call your secretary? It's a quarter after 4, and ask her to look for this list? Could you give your aide—and we will take a minute to recess—a little direction as to where your secretary ought to look, if she, your secretary, doesn't on her own know where it is?

[Pause in proceedings.]

Senator EAGLETON. Did this aide help us on that, sir?

Mr. DEVINE. Yes, sir. He will try to get it.

Senator STEVENS. If you want a phone, there is one in the committee room right behind us. I would be happy to make it available to you.

Mr. DEVINE. I appreciate that, but the people are here. They will have to get it themselves.

Senator STEVENS. I was talking to your aide.

Senator EAGLETON. Did you take annual leave when you made these appearances?

Mr. DEVINE. A Presidential appointee works 24 hours a day, 365 days a year.

Senator EAGLETON. For the President?

Mr. DEVINE. Yes.

Senator EAGLETON. For the people?

Mr. DEVINE. For the people, I suppose.

Senator EAGLETON. What were you doing on behalf of the civil service system campaigning for Senator Helms; six candidates for the House, two in North Carolina; two candidates in Pennsylvania; two candidates in Maryland? How were you enhancing the prestige of OPM?

Mr. DEVINE. I am very sorry, but my aide was talking to me. Could you repeat the question?

Senator EAGLETON. You said that you worked for the President and the people 365 days a year. How were you enhancing the prestige of the OPM spending all of these days in North Carolina, Pennsylvania, Maryland, and, perhaps, if we had the list, elsewhere?

Mr. DEVINE. The Congress has specifically exempted appointments made by the President with the advice and consent of the Senate from any restrictions on campaign activities as long as they are obviously within the law. And it's expected in every administration that those individuals will campaign and campaign actively.

The taxpayers can be absolutely certain, since I work on the average of 12 to 13 hours a day, off and on weekends, every such week they got much more than 40 hours per week from me.

Senator EAGLETON. Was your—would this be a typical day, for instance? Let's take a typical day in Michigan. You were out there for a fellow named Schuette, right?

Mr. DEVINE. Congressman Schuette. [Laughter.]

Senator EAGLETON. He was Mister back then, wasn't he?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You spoke to a Rotary Club in a farm district and did four interviews; you went to a college and made other stops on behalf of Mr. Schuette, now Congressman Schuette, in mostly rural and small towns of that district in Michigan. Would that be a typical kind of a day for you?

Mr. DEVINE. Yes, sir. As you said earlier, that even under your standards, you would expect me to speak at Rotary Clubs and the like.

Senator EAGLETON. Oh, yes, Rotary is fine. Those four interviews, those were four interviews on Schuette, weren't they? You weren't endorsing a Democrat out there, were you?

Mr. DEVINE. On each occasion——

Senator **Eagleton**. You said you went on the Schuette candidacy, didn't you?

Mr. **Devine**. Pardon?

Senator **Eagleton**. You were there on behalf of the Schuette candidacy. You weren't shy about talking about you were there for Schuette at the time.

Mr. **Devine**. I believe that I mentioned that at the Rotary Club.

Senator **Eagleton**. You talked about four interviews.

Mr. **Devine**. Oh, interviews, yes.

Senator **Eagleton**. You mentioned Schuette there, didn't you?

Mr. **Devine**. Yes, I'm sure.

Senator **Eagleton**. Did you have time to run OPM that day you were out there?

Mr. **Devine**. Yes.

Senator **Eagleton**. Have you got a hot line that travels with you?

Mr. **Devine**. No, I keep in constant touch with my office and do my mail at least twice a day, often more than that. On emergencies, I am contacted during the day. I'm in constant contact with my office.

Senator **Eagleton**. On any of these trips that we mentioned, and we mentioned now four states, right, North Carolina, a whole bunch down there; Pennsylvania, two; Maryland, two; Michigan, one; Oklahoma. You were out there too, right?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. How long were you out there?

Mr. **Devine**. One night, I believe. Then I left the next morning.

Senator **Eagleton**. That takes a little time, to get from Washington to Oklahoma?

Mr. **Devine**. I had business in Dallas before I went there.

Senator **Eagleton**. Oh, you took a Government trip to Dallas, paid for by the Government?

Mr. **Devine**. Yes, sir

Senator **Eagleton**. And then took a shorter political trip from Houston to Tulsa?

Mr. **Devine**. Yes, sir, Dallas, I believe.

Senator **Eagleton**. That is a neat trick. Were you on Government business in or near California when you went out there?

Mr. **Devine**. I believe I was.

Senator **Eagleton**. Where were you on Government business in California prior to going to campaign for Mr. Sheli, who was running out there in Santa Monica, apparently?

Mr. **Devine**. I don't recall the specific event, but I would be happy to give it to you for the record.

Senator **Eagleton**. Well, you can't give it to me off that list. You lost the list.

Mr. **Devine**. Yes, sir. If I had been advised that you would need this level of detail, I would have been more than happy to submit it to your staff.

Senator **Eagleton**. But you lost it?

Mr. **Devine**. I didn't lose any of the records. I lost the little sheet that I had that was a summary which would not have answered the detail of your questioning.

Senator EAGLETON. All right. Well, what big city is Santa Monica near? What metropolis?

Mr. DEVINE. Los Angeles.

Senator EAGLETON. Los Angeles, yes. Can I refresh your memory with, were you making a Government trip to Los Angeles.

Mr. DEVINE. I have been to Los Angeles many times on Government business. Very likely I did on that date.

Senator EAGLETON. Did you give a Government-type speech in Los Angeles, you know, to a civic group or something, do you remember?

Mr. DEVINE. Probably.

Senator EAGLETON. Did you visit the Los Angeles office of OPM, perhaps, while you were there? You might do that.

Mr. DEVINE. Perhaps.

Senator EAGLETON. That trip you got reimbursed by the Federal Government because you fly from Washington, presumably to Los Angeles?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And then just perchance, coincidental happenstance, you made a little trip to Santa Monica?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. How did you get from Los Angeles to Santa Monica?

Mr. DEVINE. I don't recall, but probably by car.

Senator EAGLETON. How long did you spend in Santa Monica for Mr. Shell? Was it a whirlwind or a one-shot or what is the political term?

Mr. DEVINE. I believe it was a lunch or cocktail party. It was quick, though.

Senator EAGLETON. You call that one a quicky, huh? You went back to Los Angeles, did you?

Mr. DEVINE. Again, I don't recall. I well may have.

Senator EAGLETON. Did you fly back to Washington from Los Angeles?

Mr. DEVINE. Again, I cannot recall precisely what the itinerary was, but undoubtedly had to get back to Washington.

Senator EAGLETON. If you came back from Los Angeles to Washington, did you do that at Government expense because that is how you got out there in the first place?

Mr. DEVINE. I would assume so, yes.

Senator EAGLETON. It is a cinch that the Shell campaign didn't pay for it. They reimbursed you $69, $69 for a top Federal Government official to come from Washington to California to campaign for a Congressman. They reimbursed you $69, and Uncle Sam paid the rest.

Mr. DEVINE. It is normal practice when an official of the administration visits communities on business that the party is informed that he will be there and if they have some duty they would wish him to perform as a collateral duty, then the official is expected to do his duty while he is there.

The Government obligation precedes, in that case, the political event.

Senator Eagleton. Sure a bargain for the Shell campaign to get this ranking Government official, Presidential appointee, get him for $69, a real bargain.

Mr. Devine. Sir, looking at any Presidential appointee, and any administration, you will see the same thing.

Senator Eagleton. And they get reimbursed around $69? That is about the going price tag for a Cabinet member to go to California for a campaign?

Mr. Devine. There are very precise rules on how you allocate the expenses, and we have followed those rules meticulously.

Senator Eagleton. We know how they were allocated here. The Shell campaign spent 69 bucks, and Uncle Sam paid the rest. We know the allocation.

Who did your advance work? Let's take these campaigns in North Carolina. Do you know what the term "advance work" is?

Mr. Devine. Yes. The Helms people did the political advance work. They coordinated with other campaigns, advised them that I would be in the area, and if they were interested in having me participate, they would let me know.

Senator Eagleton. At any time that you were in the State of North Carolina, campaigning for Senator Helms and six House candidates, were you accompanied by anybody from OPM?

Mr. Devine. I believe in the last visit, the one that I went into many of the congressional districts, I had some Government business for one of the carriers in the—or one of the applicants in the health benefits plan, so I would be entitled to have some OPM official, but I don't believe I had any. I would have to check.

I believe on the earlier visits, when I did Government business that I did have an official with me.

Senator Eagleton. That is the earlier North Carolina visits?

Mr. Devine. Yes.

Senator Eagleton. Now, we are putting aside this so-called whirlwind day, right. The whirlwind day is when you were in and out of the Charlotte airport and you visited six congressional districts in one day. That is the whirlwind day, right?

Mr. Devine. Yes, sir.

Senator Eagleton. Did you have a Government official with you? Was that the day you had Government insurance business?

Mr. Devine. I did have some Government business that day.

Senator Eagleton. You had Government business that day in addition to the six congressional districts?

Mr. Devine. Yes.

Senator Eagleton. Where did you do the Government business that day, and with whom?

Mr. Devine. I don't have the precise titles, but it was a Blue Cross-Blue Shield prepaid plan in the Tri-City area.

Senator Eagleton. It just worked out you could, on this whirlwind day, take care of a little Government business there in the Tri-City area?

Mr. Devine. They had asked.

Senator Eagleton. Tri-City is Raleigh, Charlotte, and Durham?

Mr. Devine. I think it's Winston-Salem, in any event, in that area, but in any event——

Senator EAGLETON. Where was this Blue Cross outfit that you called on? Do you remember the city?

Mr. DEVINE. No, sir. It was near a University of North Carolina, though. Chapel Hill, probably.

Senator EAGLETON. That is in Chapel Hill. Yes, that's in Chapel Hill.

Mr. DEVINE. Or Winston-Salem, somewhere in that area.

Senator EAGLETON. In that area. Did you charge it to the Federal Government, that flight down and flight back? Did you do any Government business with this Blue Cross-Blue Shield?

Mr. DEVINE. Since it was a very short visit, that got a very short percentage of the cost. Again, there are very rigid rules on how you do the cost then for joint business and political appearances.

Senator EAGLETON. What did you charge the Federal Government for that very little short visit there? How long did it take, 10 minutes, 20 minutes, 30 minutes?

Mr. DEVINE. Oh, no. It was maybe an hour or two.

Senator EAGLETON. Oh, an hour. Remember, you were in six congressional districts that day.

Mr. DEVINE. As I say, I think it was 2 days.

Senator EAGLETON. Oh, it was 2 days. Two days. So you charged the Government for 1 hour? What did you charge them?

Mr. DEVINE. Or whatever it was.

Senator EAGLETON. Or thereabouts?

Mr. DEVINE. I don't recall, but it was a small amount.

Senator EAGLETON. Small amount? But the Government paid whatever it was. Small amount?

Mr. DEVINE. It would probably be the reverse of the situation you mentioned with Shell. The Government probably had something in the $60 range.

Senator EAGLETON. I see. And what official was with you, if any, from OPM when you called on the North Carolina Blue Cross-Blue Shield folks, maybe in Chapel Hill, maybe in Winston-Salem?

Mr. DEVINE. As I say, I don't remember one being on that trip.

Senator EAGLETON. You don't remember?

Mr. DEVINE. I don't believe there was, but I am vague where someone might have met me at the Blue Cross—I don't think so.

Senator EAGLETON. Now, on another trip, there was a Government official from OPM with you?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Tell us about that trip, will you?

Mr. DEVINE. I had a speech before the Chamber of Commerce—I believe it was in Raleigh—another group I would suspect you could say is appropriate.

Senator EAGLETON. Wonderful.

Mr. DEVINE. And it was a speech. It was arranged on labor issues. My general counsel came with me on that trip to help me deal with that, and he also met with a member of the Federal Service Impasses Panel on that trip, in which he had particular knowledge.

Senator EAGLETON. In Raleigh?

Mr. DEVINE. I believe it was Raleigh.

Senator EAGLETON. Was that a 2-day trip?

Mr. DEVINE. Yes.

Senator EAGLETON. How much time was consumed in the Chamber of Commerce speech and the Federal—what did you call it?

Mr. DEVINE. Service Impasses Panel.

Senator EAGLETON. Service Impasses Panel. That was in Raleigh, too?

Mr. DEVINE. This was—the Impasses Panel has people who are not full-time Federal employees—this was a particular member who happened to live in the city we visited with, and we discussed some issues. I believe we met with him for breakfast or before breakfast and discussed various issues; the Chamber, may have been there 1½ hours or so. Again, on that trip, as on all trips, the time was allocated in proportion to the amount of time I spent on the event.

Senator EAGLETON. So whatever that allocation was, the Federal Government paid for that, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. All right.

Did you allocate all or part of a round-trip plane ticket?

Mr. DEVINE. Part of it would be allocated to the plane. Everything is done proportionate or the actual expense, whatever is appropriate for the particular expense.

Senator EAGLETON. During your numerous appearances, how many appearances for Helms, three? It was three appearances?

Mr. DEVINE. Do you mean three separate?

Senator EAGLETON. Trips for Helms, but you made numerous whirlwind appearances like this Michigan thing, but three separate forays, three separate excursions into North Carolina?

Mr. DEVINE. To the best of my recollection, yes, there were three.

Senator EAGLETON. On any of those trips, was a Federal Government offical from the OPM with you?

Mr. DEVINE. As I said, on the most recent one, I believe there was not.

As I mentioned, the first visit, my general counsel was with me. I don't believe anyone was with me the second time; but there may have been, I just can't recall.

Senator EAGLETON. So summarizing North Carolina, then, there was 1 day and 1 day only in Raleigh, when you gave the Chamber speech, and they had that meeting with the gentleman from the Federal Impasses Panel? That's the only time you were elbow to elbow with anybody from OPM in North Carolina? Is that correct?

Mr. DEVINE. I would not say that. I just don't recall sufficiently to say that, but that's the best of my——

Senator EAGLETON. Can you think about it, now, because that's the one you told us about. That was a general counsel type person, right?

Mr. DEVINE. Yes.

Senator EAGLETON. Is that the only time during the numerous visits to North Carolina where you had an OPM official with you?

Mr. DEVINE. I just don't recall. I may have had my regional representative on one of the others, but I just do not recall.

Senator EAGLETON. If you had the regional representative with you, what business was he doing with you? Is the regional representative one of those five folks that I asked you to bring some information on for today?

Mr. DEVINE. Yes, sir, that I sent the information to you on.

Senator EAGLETON. Oh, yes, we are going to get into it in a minute.

Mr. DEVINE. Yes; one of their duties is to arrange for my contact back with the central office when I'm out in the regions.

Senator EAGLETON. Who might that person have been during your trip in North Carolina?

Mr. DEVINE. Mr. Wandling.

Senator EAGLETON. Who?

Mr. DEVINE. Mr. Wandling.

Senator EAGLETON. Oh, yes, we mentioned him yesterday. What was the official Government business that you and Mr. Wandling jointly executed that time in North Carolina?

Mr. DEVINE. As I say, I am not even sure that he was with me, but all he would need to justify his presence would be necessity of keeping in touch with developments in the headquarters.

Senator EAGLETON. If that be the case, then wouldn't you want somebody with you at all times so that they could be in constant and continuous touch with headquarters?

Mr. DEVINE. Yes, and that is my normal practice. In the particular, on the last trip down there, it just seemed to me it was so hectic that it probably would be too difficult to have somebody else with me in small planes and things like that. It is difficult to have someone else, so I figured I would do it myself. And, fortunately, there weren't any difficulties we couldn't handle without staff.

Senator EAGLETON. Did you have any staff with you out there in Michigan, the trip you made to Michigan?

Mr. DEVINE. I believe I did.

Senator EAGLETON. Who was that, and—

Mr. DEVINE. That would have been Mr. Carey.

Senator EAGLETON. Is he one of these five fellows again?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Did he fly out with you, or was he there in Michigan?

Mr. DEVINE. He was there when I arrived. He is based out in the Midwest.

Senator EAGLETON. In the Midwest.

Mr. DEVINE. Out of Chicago.

Senator EAGLETON. Where is he headquartered?

Mr. DEVINE. Chicago.

Senator EAGLETON. Chicago?

Mr. DEVINE. Yes.

Senator Eagleton. So he somehow got from Chicago to this district in Michigan? What is the main city in that Schuette district?

Mr. DEVINE. Midland.

Senator EAGLETON. What?

Mr. DEVINE. Midland.

Senator EAGLETON. What big city is that near? Near Detroit or Grand Rapids?

Mr. DEVINE. It is north of Detroit.

Senator EAGLETON. So Mr. Carey had to get from Chicago to north of Detroit to join you?

Mr. DEVINE. Yes, sir.

Senator **Eagleton**. What Government business were the two of you jointly executing up in Midland, MI?

Mr. **Devine**. Well, as you mentioned, a speech to a Rotary Club or a Chamber of Commerce is appropriate. I believe I spoke to the Chamber of Commerce of Midland, MI.

Senator **Eagleton**. You don't speak to Chambers on your own? I mean, you have got to have Carey there with you?

Mr. **Devine**. Well, as I say, even under your standard, that was appropriate.

Senator **Eagleton**. OK. How about Pennsylvania, the two visits to Pennsylvania? Anybody from the OPM with you?

Mr. **Devine**. Yes, Mr. Wandling was with me on both occasions.

Senator **Eagleton**. Oh, Wandling went to Pennsylvania, too?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. Of five of these fellows, he is the one in Chicago, he covers——

Mr. **Devine**. No, no, no. That was the same one that went to North Carolina.

Senator **Eagleton**. I beg your pardon.

Mr. **Devine**. He covers the East.

Senator **Eagleton**. East coast? Where is he headquartered?

Mr. **Devine**. He is headquartered in Washington, but he is in charge of the office in Philadelphia—not in charge, but he deals with the office in Philadelphia and the office in Atlanta.

Senator **Eagleton**. I think you made a Freudian slip. I think he is in charge of the office in Philadelphia.

Mr. **Devine**. No; he is not in charge.

Senator **Eagleton**. He has something to do with the office in Philadelphia, doesn't he?

Mr. **Devine**. He is—his charge, his position description, says the Combined Federal Campaign out of that region, the executive resources boards efforts out of that region, the public affairs out of that region and congressional relations out of that region.

Senator **Eagleton**. So he was with you during these two—or did you stop in those two congressional districts the same day, the two Pennsylvania ones?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. And he was with you on that?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. How about out there in Oklahoma? You made a visit out there. Was a Federal OPM employee with you?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. Who was that?

Mr. **Devine**. Patricia Seawright.

Senator **Eagleton**. She is, again, one of these five?

Mr. **Devine**. That's her. She works out of the Denver and Dallas regional office.

Senator **Eagleton**. What was the Government business you were jointly executing there with Miss Seawright in—where was that district in Oklahoma, Tulsa?

Mr. **Devine**. She was involved in setting up a conference with private sector business executives in Dallas and accompanied me there, and came to Tulsa to maintain my contact with the central office while I was there.

Senator EAGLETON. But she was the contact liaison? You didn't call on Blue Cross or anything like that?

Mr. DEVINE. I don't believe I did any Government business, no.

Senator EAGLETON. Miss Seawright was executive director of the Colorado Reagan-Bush campaign in 1984. Is that right?

Mr. DEVINE. I do not know. If you are reading off her resume, I would have no reason not to believe it.

Senator EAGLETON. I am reading off the sheet that was supplied to us by you.

Mr. DEVINE. Yes.

Senator EAGLETON. And she was with Americans for the Reagan Agenda, 12-82 to 11-83, coordinator of that group. She was a candidate on the Republican ticket for the Colorado House of Representatives in 1982. She was executive director of a Republican group called Citizens for a New Beginning, 1981 to 1982, and she was on the Colorado Republican Inauguration Committee, 1980 and 1981. She was with the Reagan-Bush Committee in Colorado. She was administrative assistant to the executive director of that committee in 1979 and 1980. She was coordinator of a group in Colorado called Delegates for Reagan. So you needed her governmental experience and her governmental savvy to be with you when you went from Dallas to Tulsa? Is that right?

Mr. DEVINE. Well, what I needed her for was to help me keep in contact with the home office. That means you need skills in keeping track of where I am versus the time of day in Washington and being able to dial telephones and get in contact.

Senator EAGLETON. How about that trip to Santa Monica, the one where you flew from Washington to Los Angeles when you went up to Santa Monica, did you have anybody from OPM with you?

Mr. DEVINE. I would presume that Mrs. Nelson was with me.

Senator EAGLETON. Mrs. Nelson? Is she one of the five?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Oh, yes, Mrs. Nelson. She was campaign coordinator for Reagan-Bush in California, 1980, 1981; and she was also coordinator of another separate committee called Reagan for President Campaign in California. She was president of a firm called Campaign Coordinators, Inc., which we have checked, that supports Republican candidates for office. Is that correct?

Mr. DEVINE. I'm not aware of the group.

Senator EAGLETON. She was headquarters manager for Hayakawa for U.S. Senate. He was a Republican member of the Senate. And then another entry, campaign coordinator for Reagan for President, the primary back in 1976. And she has served, according to this sheet, as a volunteer in every major Republican campaign from 1960 to 1970.

So, she went up with you to Santa Monica, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Did Miss Seawright seek reimbursement? She is the lady that was so active in Colorado that I detailed her. Was she reimbursed by the Government for her trip from Dallas to Tulsa?

Mr. DEVINE. I presume so.

Senator EAGLETON. I think that's right.

You were a very busy man in the fall of 1984, weren't you, Mr. Devine?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Well, as you said in your own terms, you are a 365-day-a-year guy, right.

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And you were really giving it your all for the Republican party in which you believe very devoutly in the fall of 1984.

Mr. DEVINE. Consistent with my duties.

Senator EAGLETON. And on various visits, not every visit, various visits, to these different States, OPM people were with you, and in every instance that you described, it was one of these five, what do we call these guys, regional representatives, or around town, as I mentioned yesterday, they are known as the Devine Thought Control Group or some refer to them as the Devine Commissars. They were with you, right, in some of these cases?

Mr. DEVINE. Yes, sir, although I would question the designation of them.

Senator EAGLETON. Oh? You have got 10 regional offices in the United States, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You want to reduce it down, I think you told me in my office the other day, correct?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. With the 10 regional offices, you have 10 regional directors, is that what they are called?

Mr. DEVINE. Yes, sir.

Senator EAGLETON [presiding]. You have these 10 regional directors, and they are civil servant types, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Why do you need these five folks called regional representatives, some of whom we have already described, with their intense political backgrounds?

Mr. DEVINE. As their position descriptions show, they serve a variety of functions depending—or functions that really had not received attention out in the regions prior to establishing those positions. One of the major changes that took place that helped lead to this was that the Office of Management and Budget, until this administration, was responsible for the Federal Executive Boards.

The Federal Executive Boards were transferred to OPM. These are based in the larger cities of the United States, where there is significant Federal population concentration.

I believed it was necessary to have individuals who could actually be out in the field and visit these locations so that we could increase the communication from the field to the central office.

A second responsibility that led me to this area was we conduct the Government's charitable drive, the Combined Federal Campaign, most of which activities take place out in the regions in the different installations of the Government, and we believed it would be helpful to have a coordination individual out there who could focus particularly on this important cause.

Third, public relations and congressional relations are basically centralized in Washington, and we believed that it was important to be able to respond to requests for information from Congress and the press in the regions. So, it was by looking at these various functions that I thought it would make sense to establish the Office of Regional Director—representative of the Director.

Senator EAGLETON. And in these instances, you staffed these. These are important positions, right?

Mr. DEVINE. I believe so, yes.

Senator EAGLETON. What are they paid? Pretty high up?

Mr. DEVINE. Yes, GS-14.

Senator EAGLETON. What does a 14 bring in these days, roughly?

Mr. DEVINE. About $45,000 or so.

Senator EAGLETON. Could you have a member of your staff check and see if they are all 14's? $49,000, did you say, or thereabouts?

Mr. DEVINE. It ranges, step 1 to step 10, I believe, $44,000.

Senator EAGLETON. Could a member of your staff check to see if all five of these folks are, in fact, 14's or can give us a breakdown as to who is a 14 and who is a——

Mr. DEVINE. One of my staff has said they are all 14's.

Senator EAGLETON. All 14's. OK. So anywhere from $44,000, $45,000 up to $49,000, and you found the best people to staff these were these folks that—like the lady who had volunteered in every Republican campaign since 1960?

Mr. DEVINE. That's a very demanding job. It requires a tremendous amount of travel to go between the Federal Executive Board cities and the Combined Federal Campaign cities. It's not an easy job to fill with being away from home as often as they are.

I do think campaign-oriented skills are appropriate to these. They are people-contact and people-dealing type activities similar to campaigns.

As far as the Combined Federal Campaign is concerned, you are dealing with volunteer activities, again, similar to a political campaign. Clearly, public affairs is an important part of a campaign, and clearly, knowing how to get along well with Congressmen and their staffs is also a skill that one develops in a campaign area.

So, I think it was a reasonable kind of place to expect that individuals would come from.

Senator EAGLETON. Thus, as you articulate that answer, isn't it true that the basic world of Don Devine is the political campaign world?

Mr. DEVINE. No, sir.

For example, you will notice a number of times that I was campaigning, even though relative in number out of a year period, if we looked at them over the 4-year period, it is an infinitesimally small number of times. A great majority of their time is involved in Federal Executive Board work or Combined Federal Campaign work or public affairs work or congressional relations work. If these people were hired for the few times that they provided staff support for me when I was in the city, it certainly wouldn't be worth having.

But they do perform important, essential, ongoing work that I think ultimately improves our services.

Senator EAGLETON. We discussed Miss Seawright, and she was the Colorado lady. And we discussed Mrs. Nelson. She is the California lady.

Also, we mentioned yesterday Mr. Joseph Root. He's ill.

Mr. DEVINE. Yes, sir.

Senator EAGLETON. He was a very active member of the Republican State Central Committee in Indianapolis at one time, is that right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Do these 10 regional directors ever clear anything with these five Devine representatives?

Mr. DEVINE. Public affairs statements and congressional mail.

Senator EAGLETON. So these five Devine representatives stay pretty close to those 10 career civil service people?

Mr. DEVINE. No. As I say, they spend a very large proportion of their time traveling, a good deal of the time is outside of the regional city. So they don't have a tremendous amount of interrelationships with the regional directors.

Senator EAGLETON. We have mentioned Mr. Wandling, because he was with you on some of these trips, Alan M. Wandling.

Mr. DEVINE. Yes.

Senator EAGLETON. And he operates a thing called Wandling Graphic Design. Did you know that?

Mr. DEVINE. No, not really. I knew he was in that general business.

Senator EAGLETON. Wandling Graphics does direct mail promotion, campaign materials. He works with Murty Powers Media, Inc., in California, promoting campaigns, acting as a consultant to clients, both in political and creative posture. The firm has been responsible for several major election successes. He is a Republican, isn't he, I take it.

Mr. DEVINE. I believe so.

Senator EAGLETON. He is doing this graphics work and these various promotions and responsible for major, several major, election successes. Those were on behalf of the Republican candidates?

Mr. DEVINE. I would presume so. What attracted me to Mr. Wandling was his public relations skills, graphics, and so forth, from outside.

Senator EAGLETON. And he is still with Wandling Graphic Design, right?

Mr. DEVINE. I don't know.

Senator EAGLETON. Do you have a copy of these sheets that your office submitted to us?

Mr. DEVINE. Not with me.

Senator EAGLETON. We will have a Xerox made of this sheet.

This is our summary sheet.

Mr. DEVINE. I have information from my staff that the business ended upon his accepting his assignment with OPM.

Senator EAGLETON. Oh, he is no longer with them. We are checking out the dates on that.

Let's backtrack a little to North Carolina and that Federal Impasses Panel. Remember you met with them, a person from that panel in Raleigh after a speech or before a speech? Is that right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Would that person that you met with happen to be Mr. Tom Farr?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. And is Tom Farr a law partner of a Mr. Tom Ellis?

Mr. DEVINE. Yes.

Senator EAGLETON. And is Mr. Tom Ellis the head, whatever the title is, of the Helms Congressional Club?

Mr. DEVINE. Yes. He has some relationship there. I'm not sure exactly what it is.

Senator EAGLETON. Pretty active in the relationship. Do you know or have you ever heard of a thing called the Pioneer Fund?

Mr. DEVINE. I don't believe so.

Senator EAGLETON. You are not familiar that Tom Ellis is connected with a thing called the Pioneer Fund?

Mr. DEVINE. No, sir.

Senator EAGLETON. Never discussed that with him?

Mr. DEVINE. Not that I can recall. I have no idea what it is.

Senator EAGLETON. Well, I will read you what the Washington Post described it to be in a major article. Sunday, March 31, 1985, very recent. It is a big, big set of articles, Helms connected with moneymen bankrolling Fairness in Media, and pictures of Helms, pictures of Tom Ellis. That is Tom Farr's law partner. It is all about these Helms committees.

Then it gets down to this Pioneer Fund. And it says here, "A tax exempt foundation created in 1937 for the purpose of funding research into the problems of racial betterment." Mr. R.E. Carter Wrenn, I think he is the third picture up here, Mr. R.E. Carter Wrenn, a cofounder of Fairness in Media, that is one of the newer Helms groups, where Ellis denounced the CBS allegations concerning the Pioneer Fund, is quoted here:

"That's pretty much old-fashioned mud slinging, that's what that is. And I'm really not familiar with the Pioneer Fund per se, but the basic allusion CBS made was that Tom Ellis is a racist. And that's just nothing but dirty old-fashioned mudslinging." Mr. Ellis was a pioneer in the Pioneer Fund. Tom Farr, this fellow you met with down there in Raleigh the day or days you were campaigning for Helms, and six other Congressmen, and you are down there with Farr, the law partner of Ellis, Ellis, the major-domo of the Helms enterprises, and you are doing Government business with Farr because, "He's a member of the Federal Service Impasses Panel," right?

Mr. DEVINE. Well, that's an amazing series of connections which I, of course, had no idea of.

Senator EAGLETON. It is amazing.

Mr. DEVINE. But Mr. Farr happens to be a member of the Federal Service Impasses Panel, with which the Office of Personnel Management is involved in managing the Government. That's all I know about Mr. Farr. Whatever other activities he is involved in—although I know he was supporting Senator Helms, but outside of that, I certainly don't know very much about him.

Also, he had served in our general counsel office, but I didn't know him other than to see him, so I didn't know him very well.

Senator EAGLETON. And under an allocated basis, you charged to Government time your visit with Tom Ellis, which coincidentally was in the midst of the Helms reelection campaign, Tom Farr?

Mr. DEVINE. Again, I don't have any records here. I assume if I met with a member of the Federal Service Impasses Panel, it was probably charged to the Government.

Senator EAGLETON. I ask unanimous consent, Mr. Chairman, that the article from which I just quoted headlined, "Battle for CBS Takes on Mudslinging Contest," and in which this Pioneer Fund that was founded in 1937 for racial betterment of which Mr. Tom Ellis was a pioneer, I ask unanimous consent that that full article from the Washington Post be printed in the record.[1]

Senator STEVENS. It shall be. Your request is granted.

[The article referred to follows:]

[From the Washington Post, March 31, 1985]

BATTLE FOR CBS TAKES ON AIR OF MUDSLINGING CONTEST

(By David A. Vise and Thomas B. Edsall)

The fight for control of CBS Inc. shows signs of degenerating into a mudslinging contest between the company and Fairness in Media, the conservative group that wants to put an end to "liberal bias" in the news media.

In a lawsuit against Fairness in Media, CBS has pointedly cited the fact that FIM's attorney, Harry F. Weyher, is president of a foundation called The Pioneer Fund, and that Thomas F. Ellis, Helms' chief political strategist and a founder of FIM, served as a director of The Pioneer Fund through at least 1976.

The Pioneer Fund is a tax-exempt foundation created in 1937 for the purpose of funding research into the problems of "racial betterment," according to the group's certificate of incorporation. Pioneer has financed research that attempted to show that blacks are genetically less intelligent than whites.

R.E. Carter Wrenn, a co-founder of Fairness in Media with Ellis, denounced the CBS allegations concerning The Pioneer Fund. "That's pretty much old-fashioned mudslinging, that's what that is. And I'm really not familiar with The Pioneer Fund per se, but the basic allusion CBS made was that Tom Ellis is a racist. And that's just nothing but dirty, old-fashioned mudslinging."

Weyher, a partner of the Park Avenue law firm of Olwine, Connelly, Chase, O'Donnel & Weyher, has been president of The Pioneer Fund since at least 1973, according to the group's annual government filings, which were reviewed by The Washington Post. Ellis was a Pioneer Fund director from 1973 through 1976. In addition, Marion A. Parrot is a director of both the National Congressional Club and The Pioneer Fund.

In 1983, Ellis was nominated to be a member of the Board for International Broadcasting, which oversees certain U.S. government overseas broadcasting operations, including Radio Liberty and Radio Free Europe. Ellis withdrew his nomination after several senators opposed him because of his association with The Pioneer Fund and his previously publicized views on race, according to a review of the transcript of Ellis' nomination hearings and other government documents.

In 1983, The Pioneer Fund distributed $271,081 of grants to finance and publish research including studies of eugenics, the scientific theory that the human species can be improved through the control of heredity factors in mating.

In 1982, The Pioneer Fund distributed $418,974 to finance and publish research including studies of dysgenics, which is the study of the deterioration, over time, of the heredity qualities of various races.

The Pioneer Fund also gave $10,000 in 1983 to the Coalition for Freedom, a conservative organization controlled by political allies of Helms that tries to influence public opinion by producing television programs and films.

Ellis said in his Senate confirmation hearings in 1983 that he had served as a director of The Pioneer Fund at Weyher's request, and that all he did for the fund was routinely sign documents releasing money for research grants. Ellis testified, "I do not believe in my own heart that I am a racist."

Ellis resigned as a Pioneer director after accounts of his involvement appeared in several newspapers in 1977. Weyher, who is still president and a director of The Pioneer Fund, did not return a phone call from The Washington Post. Ellis also declined to comment.

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[1] Another article entitled "CBS Fight a Litmus Test for Conservatives," from the Washington Post, March 31, 1985, may be found on p. 493.

James P. Cain, another co-founder of Fairness in Media, said Weyher was hired to represent FIM because "he [Weyher] and Tom Ellis have been acquaintances for years, and we were interested in legal counsel [Weyher] who was one, competent, and second, even more importantly, understood what our concerns were philosophically."

Controversy surrounding Ellis' views on race surfaced in the 1976 Republican presidential primary in North Carolina after Ellis, who was supporting then-Gov. Reagan for president, distributed leaflets suggesting that Gerald Ford might select a black running mate if he won the nomination.

Ellis confirmed that he put out the handbill, according to a transcript of his confirmation hearings. The transcript says that Reagan campaign officials put a stop to the distribution of the leaflets once they learned about them.

Ellis also was criticized at the confirmation hearings for a trip to South Africa at the expense of the South African government.

At the hearing, Ellis said he no longer favors segregationist policies he advocated in the mid-1950s after the 1954 Brown vs. Board of Education Supreme Court decision ordering desegregation of public schools.

In 1955, as a staff member of the North Carolina advisory committee on education, Ellis and another staff member wrote:

"The present integration movement in the public schools is but a part of a planned social revolution in the South, fostered, directed and financed by non-southern whites. . . . The eventual goal of this movement is racial intermarriage and the disappearance of the Negro race by fusing into the white."

He proposed that "there shall be no mixed schools operated in this state and that, upon the integration of any school in a unit, whether by voluntary action or court order, all appropriations, both state and local, for all schools in such unit be immediately terminated."

Senator EAGLETON. Who recommended Mr. Wandling to you for this position in your top five?

Mr. DEVINE. I had known Mr. Wandling for many years. I don't really recall.

Senator EAGLETON. How did you know him, in what connection?

Mr. DEVINE. Republican politics, basically.

Senator EAGLETON. Republican politics, again. He is active in Republican politics in Virginia?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. What——

Senator STEVENS. Senator, could I inquire what your plans are for the balance of the evening?

Senator EAGLETON. Let me tie Mr. Wandling up for a minute and then I will be with you. It will take me 1 minute.

Senator STEVENS. OK.

Senator EAGLETON. What are his activities in the Virginia Republican politics insofar as you know through the years you have known him?

Mr. DEVINE. He's done public affairs, graphic kinds of work.

Senator EAGLETON. Yes, he's done graphics for candidates.

Mr. DEVINE. Yes.

Senator EAGLETON. And a lot of them in Virginia.

Mr. DEVINE. Well, probably broader than Virginia.

Senator EAGLETON. Republican, Republican, OK.

Here are my plans. One of my most immediate plans is to yield to Senator Levin, because as I said at the outset, anytime a Senator showed up, Republican or Democrat, I would yield to that Senator. My plans are as follows, Mr. Chairman. With your permission, after yielding to Senator Levin, I am about finished with the political activities of Mr. Devine that occupied so much of his time in

1984. I have one other loose end that we are trying to tie up, and then I will get into some substantive areas, but they will not be as numerous as announced at the outset, because Senator Gore covered three or four; Senator Chiles covered one the other day; and I will try to move it along.

Senator STEVENS. I would like to take a recess about every 2 hours. So, before Senator Levin starts, I think it would be a good idea to take a 10-minute recess. It gives people a chance to visit the powder room and things like that. All right?

Senator EAGLETON. Sure.

Senator STEVENS. Without objection, a 10-minute recess.

[Short recess was taken.]

Senator STEVENS. We will come back to order. I want to say for the information of all the witnesses who will come after Dr. Devine, we are going to try to finish Dr. Devine's testimony this evening. Whether we do or not, we still start on the other witnesses at 9:45 tomorrow at which time the chairman of the committee, Senator Roth, will be chairing. I have another hearing in another committee at 10 that I must chair.

Dr. Devine, if by chance we don't finish with your presentation—and we believe that we will be—Senator Roth will be finished with the other witnesses by 11 o'clock tomorrow. We might ask you to come back after 11, but we have an agreement that the questioning will be over by 12:30. We then will go to the markup at 2:30 tomorrow. That is the current schedule.

We hope that it won't be necessary for you to come back tomorrow. We will try to finish tonight. But now it is time to recognize Senator Levin.

Senator EAGLETON. Yes. Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Mr. Chairman. I just have a few questions, and I will try not to duplicate those which have been asked. We tried to follow this to the best of our ability, but Dr. Devine, on the question of the independence of your office, to what extent do you believe it was intended that your office be independent of the President?

Mr. DEVINE. I believe it was to be independent to the degree that if the President asked me to do something that I believe was inappropriate in terms of the law or the civil service rules or regulations, that I would be able to resist such pressure.

Senator LEVIN. Do you believe it was intended at all in the way the term of 4 years was set up or in the measure of independence that was granted to your office to avoid partisan excess in your office?

Mr. DEVINE. Well, I would never be in favor of partisan excess. But as Senator Stevens read partially from the documents related to the passage of the Civil Service Reform Act, it's very clear that a major change was made in the nature of this office in establishment of the Civil Service Reform Act. They expected the Director of the Office of Personnel Management to be the President's political head of the Office of Personnel Management. And as the statement Senator Stevens quoted said, they would not have done that if they did not also create the independent Merit Systems Protection Board and Office of Special Counsel, which retain the oversight authority over the Office of Personnel Management. I would agree, absent an independent Merit Systems Protection Board, that there would be a very different nature to the Director of the Office of Personnel Management.

Senator LEVIN. I think anybody reading your record and statements that you have made during the campaign and indeed, between campaigns, would reach the conclusion that you have been partisan in the execution of your office. I don't think that would really be a matter of much debate. I think you would defend your right to be partisan and others would say it is excessive, but nonetheless, you have been partisan in the way you have administered this office, very openly partisan and political in the way you have administered this office.

Do you intend to be partisan——

Senator STEVENS. Now Senator, I have got to ask you, that is a statement for the record that I don't think ought to go unanswered. I would urge you to follow the practice of being fair with the witness and give him a response. I don't think we have any testimony here that he has been partisan in the administration of his office.

He has been partisan as a Presidential appointee. He has participated in political campaigns. I don't think that there has been any assertion here that he has been partisan in the administration of his office.

Senator LEVIN. Well, let me correct, let me just clarify, because I am not going to quarrel with you on that particular assumption at the moment.

I just want to get what is clearly obvious to me, which is that you have been a partisan during the administration of your office. I think that is a fair statement. You have been a partisan during the administration of your office. You have been out in campaigns, blasting Members of Congress, saying in various congressional districts that "You have got a bad Congressman here," that "Congress is our biggest management problem, and you have to make some changes if you want it to work."

I mean, anybody reading those statements on the campaign trail would say you have been partisan during the administration of your office.

Mr. DEVINE. Well, it was interesting; I was looking over these historical questions which were raised yesterday, looking back to a Democratic chairman of the Civil Service Commission whom I couldn't believe. It was in the fifties, and he said the same thing, "Congress is our biggest management problem; they tend to micromanage."

I don't consider that a partisan statement. It is one we could disagree over how much Congress should be involved in the day-to-day management of the executive branch.

But I don't consider that partisan. As I stated in my series of quotations from Theodore Roosevelt, I think that one can, in this position, even under the old Civil Service Commission, which was much, was clearly much less partisan—that a man like Theodore Roosevelt could be partisan and campaign—and three specific examples I mentioned, very highly criticized on one occasion for being very partisan; that one can be partisan in terms of taking the message of the administration or supporting candidates and be able to divorce that from the daily administration of the Office of Personnel Management.

I would say someone that could not do that should not be Director of the Office of Personnel Management.

Senator LEVIN. Would you acknowledge that your statement in Lansing on July 18 about the snowflakes, "One or two don't make a difference, but a lot of bad ones are a problem. Unfortunately, you've got one here," is partisan?

Mr. DEVINE. Yes, I would say that is partisan.

Senator LEVIN. Would you say that is partisan?

Mr. DEVINE. That is partisan. [Laughter.]

Senator LEVIN. Calling a Congressman a snowflake isn't partisan, maybe calling him a flake. But when you say, "You have got a bad Congressman here," would you agree that is a partisan comment?

Mr. DEVINE. I wouldn't disagree it is partisan. I meant a bad snowflake, however.

Senator LEVIN. All right. Without in any way changing by humor what was intended, you intended that to be a partisan comment. Is that correct?

Mr. DEVINE. That's correct.

Senator LEVIN. OK. And when you said that "We have got to make some changes in Congress," the same day, in Lansing, MI, you were talking about changing Members of Congress, and would you agree that was a partisan comment?

Mr. DEVINE. Well, sir——

Senator LEVIN. Pardon? Pardon?

Mr. DEVINE. Well, I guess—I don't know. The institution of Congress, as you well know, many Congressmen run against Congress, and I agree, whether you are talking about the institution or individuals. I'm not sure exactly what I meant, but I won't question that it might have been partisan.

Senator LEVIN. Fine. So you do agree that during your administration of this office you have made partisan statements?

Mr. DEVINE. Yes, sir.

Senator LEVIN. Now my question is your future intention. Is it your intention to make partisan statements, if you are reconfirmed, to the same degree that you have in the past?

Mr. DEVINE. I would intend, unless there is a change in the law, to be, say, involved in the congressional elections 2 years down the road unless the President didn't think I should or nobody wanted me to campaign for them.

Senator LEVIN. My question, though, is, you acknowledged that you have made partisan statements in the past during your tenure. My question to you is, is it your intention, if reconfirmed, to make partisan statements to the same degree?

Mr. DEVINE. I would feel it's appropriate to take the President's message to the voters and to state which Congressmen we thought would help get through the President's program, including his personnel program, unless, again, he didn't think it was appropriate or I thought it was inappropriate, but I certainly wouldn't rule it out.

I think that probably answers your question.

Senator LEVIN. And so you also intend to campaign against Members of Congress, if you are reconfirmed, on the same basis?

Mr. DEVINE. As I say, I would not exclude that. I have not thought that far along.

Senator LEVIN. All right. Now, you are reported in the spring of 1983 in the American Review of Public Administration to have made the following—I think this is your comment—to have made this following comment about the civil service. Let me make sure this is yours. "But what about civil service? Even with the pared bureaucracy, will Federal employees remain a caricature of inefficiency and the phrase 'I'm from the Government and I'm here to help you, an ironic joke on the lack of performance compared to promise?' "

Do you believe that now, 1½ years later, the bureaucracy, the Federal employees, continue to "remain a caricature of inefficiency and the phrase, 'I'm from the Government and I'm here to help you,' an ironic joke," is that still an accurate assessment of your beliefs relative to Federal employees?

Mr. DEVINE. Well, it is my belief that such a caricature existed and still to some degree does exist. I think we have changed perception of management in the Federal Government and of Federal employees; that we have made changes to move toward performance management—as we have improved the bonus for performance system for executives, merit pay for mid-level managers—and I think that we have made some progress in the area of changing that stereotype.

I do not believe that Federal employees fit that caricature. I do believe that we have structures in the Government that don't allow them to achieve their full potential, and that if we could remove some of them, we would be able to have better working habits in the Government.

I have said on many occasions that I believe we have good people. The problem is the system should be made better so they can work better.

Senator LEVIN. Are you saying that when you wrote that in 1983 you meant that was an unfair stereotype?

Mr. DEVINE. Yes, sir.

Senator LEVIN. Or an inaccurate stereotype?

Mr. DEVINE. Yes, sir.

Senator LEVIN. Well, that is not—and maybe the context is a little different, but that is not the way I read that statement.

Mr. DEVINE. Well, you can look at many of my other speeches. I understand that the staff does this. They pick out ones to try to make them interesting. But I think they will find many, many, many more positive statements about Federal employees which are very clear in their intention, rather than one which may be somewhat unclear on my part.

I don't remember it. I don't question its accuracy, but I certainly didn't mean it that way.

Senator LEVIN. So in other words, you believe that the context of that statement in that article would make it clear that that was an unfair stereotype?

Mr. DEVINE. I would hope it would. If it wasn't, given my inartfulness, I have tried to make that statement from my first day, indeed, from the first day in the transition. I remember one article that was written in the paper. I was interviewed on a show—some conservative corner or something like that, and I was attacked by several of the commentators—and the reporter was surprised that I didn't take an opportunity to take a cheap shot at Federal employees. I don't. I think they're good people; I think they're dedicated people. But I think that we can do things to change the structure and the nature of the system under which they can work better. I appreciate this opportunity to be able to clarify that statement.

Senator LEVIN. Last question, Mr. Chairman.

Is Congress still our biggest management problem?

Mr. DEVINE. I believe it is. I don't think, as I mentioned earlier, that is a partisan statement. I think it is very much in the nature of representative Government; that the legislative branch and the executive branch are going to have differences of opinion over the degree of management oversight exercised by the legislative branch.

I do believe that if Congress, for example, adopted the management reforms that the administration is supporting and would allow us a little more flexibility in terms of how we manage—for example, removing the lower limit on the number of employees that the Department of Energy could have, even though the Secretary of Energy has testified that he doesn't need that many people to run all the programs Congress wants to the best degree they can be managed—that if we could get rid of some of those, we could have more efficient management in the Government.

I think in a democratic form of government there is probably always going to be some level of inefficiency built into it because of that. Some of that is even necessary. It's a question of balance, and I think the pendulum balance has shifted somewhat too much in the direction of restrictions on our ability to manage more efficiently than it otherwise should have.

Senator LEVIN. Is it your intention in making that statement to say that Congress as an institution is the biggest management problem we have, or that a particular Congress is the biggest management problem that you have?

Mr. DEVINE. Well, as I said, I think it's both. I think the nature of the institution, to some extent, does it and to some extent, the composition.

Senator LEVIN. Thank you. Thank you, Mr. Chairman.

Senator STEVENS. Does that finish your questioning?

Senator LEVIN. Yes, thank you.

Senator EAGLETON. Back to, and very briefly, the PACE exam, and Mr. Devine, PACE, remember, we had a conversation about that and then a little set-to about your statement that no one in Congress had ever asked about that and then it turns out Senator Stevens had asked about it, and you said, "Yes, that's right." Do you remember that?

Mr. DEVINE. Yes, sir. Remember, I corrected it, and I hadn't realized I was being that closely questioned about it. There may have been other cases.

Senator EAGLETON. Well, there are. For instance, do you remember March 1, 1983, House Civil Service Subcommittee, Schroeder chaired, numerous pages of this little tiny print that I can't even read with my glasses, to tell you the truth, about PACE? Does that jog your memory?

Mr. DEVINE. What was the date of that, please?

Senator EAGLETON. Committee hearing, 98th Congress, first session, March 9 and 10, 1983, Civil Service oversight.

[Excerpts from the hearing referred to follow:]

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CIVIL SERVICE OVERSIGHT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON

POST OFFICE AND CIVIL SERVICE

HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

MARCH 9 AND 10, 1983

Serial No. 98-6

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United States
Office of
Personnel Management
Washington, D.C. 20415

July 19, 1983

Honorable Patricia Schroeder
Chairwoman, Subcommittee on Civil
Service
Committee on Post Office and Civil
Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mrs. Schroeder:

Enclosed are the answers to your questions delivered after our oversight hearing.

Sincerely,

Donald J. Devine
Director

activities the name, title and grade level of the individual undertaking such activities. Include in this monthly report, the number of Hispanic (men and women) accessions and separations for all pay systems, broken down by general schedule and equivalent.

82. In 1982, the Federal government entered into a consent decree in the *Devine* v. *Luevano* case, as a result the Professional Administrative Career Examination (PACE) was abolished and OPM developed a Schedule B authority which permitted PACE jobs to be filled non-competitively after meeting certain criteria. How many Hispanics and blacks have been hired under this Schedule B authority? How many Federal agencies have requested authority to hire under this Schedule B authority? Which agencies are they and what positions are involved? For the duration of the Schedule B authority please submit to this subcommittee, at the end of each month, a report showing the number of Schedule B appointments made, broken down by ethnic, race, sex and agency.

A. Answers to Questions #69-82.

OPM continues to operate an active Hispanic Employment Program despite reduced Government hiring activity. In Washington, the program is staffed by three full-time employees: GS-260-15 ($53,679), GS-260-7 ($16,559), GS-318-5 ($13,369). At the end of the Carter Administration, four full-time employees were assigned to the Program. We have also continued the practice of the previous Administration of not budgeting for specific affirmative employment programs. Our overall AEP budget for the Central Office for FY '82 was $1,100,000 and for FY '83, it is $909,000.

The Hispanic Employment Program (HEP) Office plays a key role in providing Governmentwide leadership. For FY '83, its major focus is on developing proposals for two publications to assist agency special emphasis program staffs. We also address Hispanic underrepresentation at the national and regional levels through the Federal Equal Opportunity Recruitment Program and our other special emphasis programs. Our training centers offer courses in HEP; our agency compliance and evaluation units cover HEP in their evaluations; and our staffing group provides job information to the Hispanic community and technical assistance to agencies on Hispanic staffing issues.

Our data show that full-time employment of Hispanics in the government increased from 2.9% to 4.4% between 1970 and 1981. As of December 31, 1982, there were 65 Hispanics in the Senior Executive Service (SES) compared with 76 two years earlier. During the same period the total number of SES members decreased by 225.

We are not aware of any plans regarding Presidential statement or Executive Order, but believe that any such directive would need to recognize that government is currently undergoing a significant redirection that directly affects Federal employment and that these conditions have an impact on all societal groups.

As for the subcommittee's request for such detailed monthly reports on the Hispanic Employment Program, we simply do not have the resources to comply.

83. You defend the Federal Merit System very effectively, yet of the political appointments you have made in OPM, I don't believe any of the appointees ever made so much money or supervised so many people. How do you justify this "philosophical inconsistency"?

A. We appreciate your kind comments regarding our defense of the merit system. We believe both career and noncareer appointees must work together in harmony.

84. What is happening with revisions to the Uniform Guidelines for Employee Selection Procedures? Is there a need to revise the Guidelines?

A. The Guidelines have been in effect since 1978 without any modification. During that time, many in the psychological profession have commented that the Guidelines are seriously out of date and no longer reflect current professional thinking. OPM believes that it is appropriate to consider needed modification to correct this situation.

Aside from the many professional psychologists who have questioned the current status of the Guidelines as well as legal commentators, the General Accounting Office, in an independent review of the Guidelines, has called for a review to make needed revisions.

The Guidelines state that they are intended to be consistent with professionally accepted methods and techniques. Where a substantial number of professional psychologists question whether the Guidelines are in fact reflective of current professional thinking, OPM believes the Guidelines themselves dictate a careful review and necessary revisions.

85. What is OPM's appropriate role in efforts to change the Uniform Guidelines? Is it true that EEOC plans to develop a review procedure for this year? Is OPM involved in this?

A. OPM, as successor to the Civil Service Commission, is a signatory to the Guidelines. Furthermore, OPM is the Federal personnel agency, responsible for the personnel functions of the nation's largest employer. OPM, therefore, has a vital role to play in any activity regarding the Guidelines, both as a participant in the development of the Guidelines as well as in its role as an employer committed to the use of fair, effective and efficient testing methods. OPM has been advised that EEOC plans to implement a study of the Guidelines in the near future. We are awaiting formal notification from EEOC as to the scope of that review. Until we are so notified by EEOC and determine what OPM's role should be OPM cannot state what our involvement will be in the review led by EEOC.

employment, we do not think we could reasonably be expected to allocate what is already limited OPM money and staff resources to expanding our role in providing placement assistance with commercial enterprises.

130. Please explain how you are examining the positions which used to be filled by the Professional and Administrative Career Examination (PACE). How has the use of Schedule B hiring authority been used? What efforts are OPM making to monitor agency use of Schedule B hiring authority?

A. Agencies needing to make external hires in professional and administrative career (PAC) positions for which they would previously have requested certification from the PACE must now request, through their headquarters, that OPM authorize Schedule B appointments. If the authority is granted, the hiring agency is responsible for deciding what sort of publicity will be used and what sources will be contacted, and for developing its own procedures for ranking and referring candidates. These procedures must apply OPM's basic qualifications standards (contained in Handbook X-118) for determining eligibility for PAC positions and must afford veterans preference eligibles at least as much preference as they would have received under PACE procedures. An agency need not assign numerical scores or observe rule-of-three, but if numerical scores are used, veterans must receive extra points. If candidates are ranked by adjective categories, preference eligibles must be at the top of their category. If there are not enough candidates to warrant ranking, veterans must be referred first. Preference eligibles may be passed over for lower ranked or lower standing nonveterans only for proper cause.

Consideration or priority placement and status candidates and provision for applying veterans preference will be monitored both when Schedule B authority is requested and in subsequent evaluations. Consideration of candidates through the Displaced Employee and Interagency Placement Assistance Program is verified through OPM regional offices when a request is received. If consideration of status candidates or provision for veterans' preference appears inadequate, the agency is required to take further action before the Schedule B request will be processed. Agencies' use of their approved Schedule B authorities--including compliance with statutory nepotism and prohibited practices restrictions, consideration of priority placement and status candidates, and relationship to other staffing programs--will be reviewed during periodic personnel management evaluations.

131. As we understand it the Schedule B authority for hiring involves only two year appointments. Will you be able to successfully recruit people into the Federal Government with this sort of appointment?

A. Yes.

132. Based on your experience so far, how many agencies will use the Schedule B hiring authority and how many people will be hired under this authority?

A. So far 15 departments and agencies (5 in Defense) have received Schedule B authority for a total of 3,191 positions. Several of these authorities cover the agency's total planned career intern intake for a 6 or 12 month period. We expect few additional departments and agencies will seek Schedule B authorization, although we may see requests from additional organizations within those agencies which already have some Schedule B authorities. Data on use of Schedule B appointments will be compiled after January 31, 1984, when agencies must submit the race and national origin data required by the consent decree. We expect actual hires to be lower than the number of positions authorized because agencies ask authority for the largest number of jobs they expect to fill from outside, and several agencies have stated informally that they are not using all their Schedule B appointment hiring authority.

133. What rules will govern conversion from Schedule B appointments to permanent appointments?

A. Conversion to competitive appointments will require Schedule B appointees to be certified from competitive examinations in the same manner as all other candidates applying through those examinations. OPM will make necessary provisions to ensure that conversion of Schedule B appointees and their progression up their career ladders is not artificially blocked by lack of an appropriate open register. We expect most Schedule B employees will compete successfully. They have already competed for Schedule B appointments under the same standards and veteran preference requirements, and will have specific experience on the job. PAC appointees who are converted to competitive appointments will receive credit for conversion from career-conditional to career-tenure from the date of their competitive appointments and will have to serve a new probationary period if they are converted in a different agency or different line of work. Otherwise, their Schedule B service will be creditable for all purposes.

134. In drafting the regulations, what alternatives to the use of Schedule B authority did you consider and why did you reject those other proposals?

A. Very many possibilities were considered. None met the decree provisions as well as the method adopted.

135. What is OPM doing to ensure competition and merit selection in the absence of PACE? What plans are being made for new examinations? Will agencies be permitted to develop their own exam?

A. In the absence of PACE, we are doing our best to protect the merit system; we are considering the possible use of new examinations. OPM will develop such exams.

136. What role did you play in the decision early on Friday, February 11, 1983, to have Federal workers come in despite the snow? Did you make the final decision or was the decision made by Pat Korten and Mark Tapscott? On what did you base your decision? According to a letter to the Subcommittee from the National Weather Service, they advised OPM officials accurately and well in advance of the severity of the storm.

Mr. DEVINE. No, I don't recall it. I don't question it, but I don't recall it. Were they questions submitted after the hearing?

Senator EAGLETON. Yes. They were questions submitted after the hearing, very detailed questions about PACE.

Mr. DEVINE. As I said, I didn't remember it orally stated. I have no reason to doubt that that is what happened.

Senator EAGLETON. Numerous pages. I won't bother counting them, but you will take my word, won't you, lots of these little tiny single——

Mr. DEVINE. But it was the first time, at least that I remember, being questioned about it orally.

Senator EAGLETON. Remember I asked you about going to Maryland and you used your personal car on those campaign trips?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. The two you made into Maryland. But you have had a little trouble, haven't you, though, with using your car for political purposes? Hasn't the GAO given you a little advice about the use of your car?

Mr. DEVINE. I have followed the GAO's interpretations of the use of chauffeured automobiles. It has changed. GAO admitted that its earlier guidance could have led individuals to use it in a different way. I submitted——

Senator EAGLETON. Did you agree to discontinue use of cars for "political, religious and personal types of events"? Devine first said, "Anything I go to is official use." But then you agreed to discontinue such use after the GAO advised against the practice, according to the Federal Times, August 13, 1984, page 1.

Mr. DEVINE. I didn't agree. I asked the General Accounting Office to interpret our interpretation, and when they came back with a different interpretation, I chose to change it. In fact, it interpreted the guidance more rigorously than even their interpretation of it was.

I might mention that Senator Proxmire has questioned me very closely on this.

Senator EAGLETON. Oh, yes.

Mr. DEVINE. I have submitted a great deal of material to him, and I'm sure if there were any problems, I would have heard back from him.

Senator EAGLETON. Anyway, you did change your practices as to the utilization of your official automobile after the GAO had written something on it?

Mr. DEVINE. Yes, after they changed their interpretation of what the rules were.

Senator EAGLETON. Now, let's clear this up. I note that in the McGrory column, there was a retraction the very next day, and you highlighted that in your opening statement. So that part is taken care of.

Mr. DEVINE. Yes, I——

Senator EAGLETON. There was a second quote in that article. I just ask you if that was true or false. They quoted you as saying, "I thought the audience would think it appropriate to introduce an element of mean spiritedness."

Mr. DEVINE. Mrs. McGrory said that she wished that she had also included that. That was not my statement.

Senator **Eagleton**. OK.

Mr. **Devine**. However, the statement about the Washington Post was mine. [Laughter.]

Senator **Levin**. Both parts?

Senator **Eagleton**. On these statements, here is one. Quoting Devine, "No Federal worker should be allowed collective bargaining rights."

Do you remember that one? Do you remember?

Mr. **Devine**. I sure would like to see the context that was made in.

Senator **Eagleton**. You were speaking to the Society of Federal Labor Relations Professionals on March 18, 1985. Boy, that is a fresh one. I think you even mentioned earlier, in testimony yesterday, that you—didn't you mention that you talked to this group, the Federal Labor Relations Professionals? You were sort of bragging how cozy you were with the unions and union leaders, and you just got along real hunky-dory with all the union fellows?

Do you remember speaking to the Federal Labor Relations Professionals March 18?

Mr. **Devine**. Yes.

Senator **Eagleton**. Did you not say in those remarks, "No Federal worker should be allowed collective bargaining rights"?

Mr. **Devine**. I certainly would have qualified that in many different ways.

Senator **Eagleton**. If you don't remember saying that——

Mr. **Devine**. If you are talking about over pay, yes, it is prohibited by law, and I also agree with that as a public policy matter.

If you are talking about benefits, yes, I agree in terms of benefits, which is also part of the law, and I agree with——

Senator **Eagleton**. Yes, you agree?

Mr. **Devine**. That they should not have collective bargaining over their pay or their benefits, which is the existing law.

Senator **Eagleton**. What about those things law does permit? For instance, does not the law permit bargaining over conditions of employment such as parking, work environment; and is it not true that managers are not prohibited from bargaining over numbers, type, and grades of employees assigned to each subdivision of any agency? They are not prohibited from bargaining on technology, methods and means of performing work.

The law permits that. Do you favor that law, or do you recommend a law striking that out?

Mr. **Devine**. The question of the reach of management rights under the Civil Service Reform Act is probably one of the most complicated questions in the whole personnel area. You have tremendous disagreements over precisely what is covered and what isn't covered.

Given our interpretation of what can be bargained over, I have no serious argument with it as a right. However, the basic thrust of that speech that you refer to was that we would be much better off in the Federal Government if both management and labor were not constantly claiming, "I'm not going to talk to you because this is a management right," and on the other side, "I'm not going to talk to you because this is a labor right."

I suggested a process which I call constructive consultation, and I mentioned the National Treasury Employees Union and their discussions out of the narrow collective bargaining area with the Internal Revenue Service that I look on as a very positive model for labor relations in the Federal Government.

Senator EAGLETON. OK. Well, you are not for broadening the law on collective bargaining rights?

Mr. DEVINE. No, sir. Well, let me qualify. There may be circumstances under which I would be willing to discuss that. I think one of the——

Senator EAGLETON. You are not prepared to recommend it at this time, are you? I am not pressing you.

Mr. DEVINE. Not at this time, no sir.

Senator EAGLETON. If you did say in the speech, "No Federal workers should be allowed collective-bargaining rights," you now qualify it by your previous answers as appearing in the record?

Mr. DEVINE. Yes; and most of which I made during the same speech, which I think qualified it clearly enough for the audience.

Senator EAGLETON. You like to be confrontational; you brag about that. Of course, that was confrontational. You brag about the fact that you are a confrontationist, so you like to jazz up your speeches. You don't like them to be dull and droll. My God, talking about actuarial estimates and things puts everybody to sleep, so you have got to spice up a speech, so when you say to an audience, "No Federal employee ought to have collective bargaining rights," that really gets their attention.

Mr. DEVINE. I don't—again, if that is accurate at all, I'm sure it was highly qualified.

Senator EAGLETON. You told the Washington Post that you liked to be dramatic and you——

Mr. DEVINE. I consider dramatic different.

Senator EAGLETON [continuing]. And you like confrontation to show. After it is shown, you can sit down and try to work out a solution, but you have got to show a little confrontation.

We have had a little confrontation here a couple of days.

Mr. DEVINE. That is why I am enjoying myself so much. [Laughter.]

Senator EAGLETON. Believe me, I am getting a hell of a kick out of it, too. [Laughter.]

All right, you are an interesting fellow. Anyway, that dinner where you did not make those quotes, anyway, that was a political fundraiser, right? Was the article right on that, the Faith Whittlesley dinner?

Mr. DEVINE. Yes.

Senator EAGLETON. Yes, there was some political money there. So is that your most recent political appearance, political type appearance where the money has gone for political purposes?

Mr. DEVINE. I presume so.

Senator EAGLETON. You answered Senator Levin, if you are reconfirmed, you ain't going to change one whit. You are Don Devine, political operative.

Mr. DEVINE. I didn't say I wouldn't change one whit.

Senator EAGLETON. Would you change two whits? [Laughter.]

Mr. DEVINE. I really believe that the second term could take place in a very different environment. We had several issues, but the most important, by far, is the retirement system.

Senator EAGLETON. We are going to get into substance. You know what we are talking about, Mr. Devine, what Senator Levin and I are talking about. Our questions focused on your rampant, continuous political activities. We will get into retirement in a minute.

Are you going to change in that respect.

Mr. DEVINE. I think it depends. If we can get this retirement debate in back of us, I think we can get into a much more positive labor relations environment in the Federal Government.

Senator EAGLETON. Are you going to go speak for congressional candidates in the 1986 congressional elections?

Mr. DEVINE. Again, as I said to Senator Levin, I would not rule that out.

Senator EAGLETON. OK. All right, that is good enough.

Now we will move on to Devine. I am not going to read all this, but the essence of it is in your confrontational mode, then you fire it off, some letters to three Governors, three Democratic Governors, White, Cuomo, and Celeste, September 24, 1984 in the midst of the Presidential election campaign, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Is there something in those letters that you regretted saying?

Mr. DEVINE. I don't recall any statement, but I would be willing to reconsider one if you would like to produce it.

Senator EAGLETON. For instance, after writing those three Democrats, three of the biggest States in the Union, what did you say to them in those letters? Didn't you threaten them a little bit? What did you threaten them with?

Mr. DEVINE. I didn't believe it was a word of a threat.

Senator EAGLETON. What is the gist of what you told those Governors in that letter? Have we got the letter? We have got it somewhere here. I will ask unanimous consent to put the letter to White, Cuomo, and Celeste in the record.[1]

Mr. DEVINE. I had mentioned that there was a statement made in the press that raised some questions about registration activities using Federal funds in the States, and I asked them to send me information under the authority I have under the Intergovernmental Personnel Act, which I am on record as opposing and have asked Congress to rescind.

Senator EAGLETON. Why did you just pick out the three Democratic Governors from three of the largest States in the Union and write them on September 24, 1984?

Mr. DEVINE. Because they were the only ones mentioned in the Wall Street Journal editorial that drew my attention to it.

Senator EAGLETON. Oh, an editorial in the Wall Street Journal triggered you off?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. I see. Why did you wait until October 1 to write the 47 other States and write them a much different, less threatening letter? Some of those 47 would have been Republican Governors, would they not?

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[1] See p. 190.

Mr. DEVINE. I was surprised at the reaction that I received when each of the Governors went to the press and made it a public issue. I realized then, as you well documented, having some background in politics, something had been stirred up, and that I should go to the rest of the Governors, also.

Senator EAGLETON. But a different letter. It went in a different letter.

Mr. DEVINE. I don't recall. As I remember, it was the same.

Senator EAGLETON. I ask unanimous consent that that letter appear in the record, the letter that went out a week later to 47 Governors, including, of course, the numerous Republican Governors as part of the 47, and I will let the record speak for itself as to the contrast between what was stated in letter No. 1 to 3 Democratic Governors from three big States—Texas, New York, and Ohio—versus what was said to 47 Governors a week later.

I also ask unanimous consent that a summary statement in detail on this whole, again, political episode, Don Devine in the fall of 1984 in the heat of the Presidential campaign, appear in the record.

Senator STEVENS. I have no objection.

[The two letters which have been referred to and a chronology of events follow:]

U.S. OFFICE OF PERSONNEL MANAGEMENT,
Washington, DC, October 1, 1984.

IDENTICAL LETTERS WERE SENT TO GOVERNORS WHITE AND CUOMO

Hon. RICHARD F. CELESTE,
Governor, State of Ohio,
Columbus, OH.

DEAR GOVERNOR CELESTE: The Intergovernmental Personnel Act (42 U.S.C. 4728, 4763) gives the U.S. Office of Personnel Management certain responsibilities over personnel systems of state governments which receive Federal funds (for a listing of fund programs, see, 5 C.F.R. 900, Appendix A). Intergovernmental Personnel Act Standards require that such states operate a merit system of personnel administration. Among these Standards is the requirement of "assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office," (5 C.F.R. 900.603 (f)).

It has come to our attention that your State is using its employees to ask individuals if they are registered to vote. Apparently, if they reply that they have not, they are asked why they are not registered. If they express some interest in registration, state employees are used to help the individual to become registered. The concern has been raised as to whether this use of state personnel interferes with or affects the result of the election this November, 1984.

Under 5 C.F.R. 900.604 (b) (1), "Chief executives of State and local jurisdictions operating covered programs are responsible for supervising compliance by personnel systems in their jurisdictions with the Standards. They shall resolve all questions regarding compliance by personnel systems in their jurisdictions with the Standards. Findings and supporting documentation with regard to specific compliance issues shall be maintained by the chief executive, or a personal designee, and shall be forwarded on request, to the Office of Personnel Management." Under this authority, I am requesting that you send all relevant facts and information regarding the situation mentioned above.

You should also be advised that, under section (3), "if a chief executive is unable to resolve a compliance issue to the satisfaction of the Office of Personnel Management, the Office will assist the chief executive in resolving the issue. The Office of Personnel Management, as authorized by section 208 of the Intergovernmental Personnel Act, will determine whether personnel systems are in compliance with the

Standards and will advise Federal agencies regarding application of the Standards and recommend actions to carry out the purposes of the Act."

Given the immediacy of the election, and the urgency of the matter, I would ask that you respond to this request by October 1, 1984. I very much appreciate your consideration and cooperation.

Sincerely,

DONALD J. DEVINE.

U.S. OFFICE OF PERSONNEL MANAGEMENT,
Washington, DC, October 1, 1984.

COORDINATOR OF FEDERAL RELATIONS,
Office of the Governor of North Carolina
Raleigh, NC.

DEAR SIR OR MADAM: The Intergovernmental Personnel Act (42 U.S.C. 4728, 4763) gives the U.S. Office of Personnel Management certain responsibilities over personnel systems of state governments which receive Federal funds (for a listing of fund programs, see, 5 C.F.R. 900, Appendix A). Intergovernmental Personnel Act Standards require that such states operate a merit system of personnel administration. Among these Standards is the requirement of "assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office," (5 C.F.R. 900.603 (f)).

It has come to our attention that at least several States are using their employees to engage in voter registration programs. There is nothing wrong per se in State conduct of voter registration; indeed, it is an indispensable part of the democratic process. The only question of propriety arises when it appears that registration is conducted in a coercive way or in a way intended to give unfair advantage to one party at the expense of another. The concern has been raised as to whether these programs, either on their face or in their application, may involve the use of state personnel in a manner that interferes with or improperly affects the result of the election this November, 1984.

Under 5 C.F.R. 900.604 (b) (1), "Chief executives of State and local jurisdictions operating covered programs are responsible for supervising compliance by personnel systems in their jurisdictions with the Standards. They shall resolve all questions regarding compliance by personnel systems in their jurisdictions with the Standards. Findings and supporting documentation with regard to specific compliance issues shall be maintained by the chief executive, or a personal designee, and shall be forwarded on request, to the Office of Personnel Management." Under this authority, I am requesting that you send all relevant facts and information regarding any state-sponsored voter registration program you now have in effect.

You should also be advised that, under section (3), "if a chief executive is unable to resolve a compliance issue to the satisfaction of the Office of Personnel Management, the Office will assist the chief executive in resolving the issue. The Office of Personnel Management, as authorized by section 208 of the Intergovernmental Personnel Act, will determine whether personnel systems are in compliance with the Standards and will advise Federal agencies regarding application of the Standards and recommend actions to carry out the purposes of the Act."

Given the immediacy of the election, and the urgency of the matter, I would ask that you respond to this request by October 15, 1984. I very much appreciate your consideration and cooperation.

Sincerely,

DONALD J. DEVINE, *Director.*

CHRONOLOGY OF EVENTS—DEVINE LETTER TO THREE DEMOCRATIC GOVERNORS

September 18—Wall Street Journal editorial slamming Gov. Cuomo for voter registration drive out of state offices.

September 24—Devine sends letters to three Democratic governors in New York, Ohio, and Texas implying noncompliance with merit standards and threatening cutoff of Federal funds. Gives them one week to respond.

September 27, 28—Governors Celeste and White angrily respond. Cuomo writes on October 1.

October 1—Devine sends less threatening version of the Sept. 24 letter to 47 remaining governors.

October 3—Senate adopts DeConcini amendment "to encourage voter registration drives . . . " and that they do not violate the Intergovernmental Personnel Act.

October 24—House Manpower Subcommittee holds hearings on Devine's letters. Subcomm. requests all past letters to governors on merit standards compliance. Devine claims he sent the letters due to W.S.J. editorial and a 1983 letter about enforcing compliance from Geraldine Ferraro.

January 10—Devine submits two "previous" letters to governors in response to Oct. 24 House request. One is letter to 47 governors (Oct. 1) and other is low level letter about revised standards.

March 19—House subcommittee unanimously votes in favor of report entitled "OPM's Questioning of Nonpartisan State Voter Registration Activities Constitutes a Misuse of Intergovernmental Personnel Act" (all Republicans present and voting yea).

April 2—House Gov't. Ops. Committee passes subcommittee report by voice vote. Republican subcommittee head, Howard Neilsen, endorses the report: Devine's letters to three Democratic governors "constituted a selective application and misuse of the I.P.A."

Senator EAGLETON Now, let's move on.

Senator STEVENS. There aren't any questions there?

Senator EAGLETON. No, it is a statement. There is no question.

Now, you like to issue press releases. Here is one in May 1983 on pay-for-performance regulations. That is an area we are going to get into that is controversial, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Here is what you said in May 1983.

> Four Democratic members of the House Subcommittee on Treasury, Postal Service, and General Government Appropriations have separated themselves from the President and the American people who want more efficient Government as well as from the civil servants who support pay for performance.

Do you remember that statement in that May 1983 press release?

Mr. DEVINE. Yes. I believe that was referred to the General Accounting Office, and we asked whether it violated my proper informational role as head of the agency; they said that it did not.

Senator EAGLETON. The press release said four Democratic members of the House subcommittee.

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Is it or is it not a fact that Senator Mathias and Senator Stevens here, present, both Republicans, took the same position?

Mr. DEVINE. I don't believe they did.

Senator STEVENS. What is that? [Laughter.]

Senator EAGLETON. On the pay for performance.

Senator STEVENS. We had an on-going negotiation, as I recall. I was involved in that. We worked out our compromises and finally acceded to those regulations.

Are you referring to the regulations?

Mr. DEVINE. Yes, sir.

Senator STEVENS. We finally acceded to them going into effect. But there was a time there when there was disagreement.

Senator EAGLETON. There was a time when Mathias and Stevens could well have been in this press release, correct?

Mr. DEVINE. Not on that vote. [Laughter.]

Senator STEVENS. Very discerning of them.

Senator EAGLETON. You wouldn't have issued the press release if you had mentioned two Republican U.S. Senators, would you have?

Mr. DEVINE. That was the first vote on this matter, and I thought it was important to inform Members of Congress and the public as to the situation as I saw it.

Senator EAGLETON. OK. Ever in your 4 years have you issued a press release that was critical of an identified Republican Member of the House or Senate?

Mr. DEVINE. I don't recall any.

Senator EAGLETON. There ain't any. We have had people reading your press releases.

Mr. DEVINE. I might mention there were no mentions of name.

Senator EAGLETON. Oh, no, just "four Democratic members". You never criticized a Republican.

Here is another press release. This is one you issued in March 1983 claiming: "The government spent more in 1982 on civil service retirees than on basic welfare assistance for 25 million needy Americans." That is the quote. You later admitted that you had made a $12 billion miscalculation, $12 billion, but nevertheless, you issued a subsequent press release using the same erroneous figure.

Now, when you are corrected and proven wrong, why do you intentionally issue a second press release with the same bogus $12 billion miscalculation?

Mr. DEVINE. I don't recall that. If it was, it was an error, but I believe the second one was corrected and was correct. But——

Senator EAGLETON. No, the second one still has the $12 billion mistake after you had been corrected. That is, it was cranked out with the same old erroneous figure because it played better in confrontational press releases.

Mr. DEVINE. I try to pride myself on the accuracy. When I was wrong, I tried to admit it. I recognize there are a lot of different ways to calculate figures in the Government, and it depends on the base you use and a lot of other things.

Senator EAGLETON. Did you write a byline article in the Chicago Tribune in July 1983 in which you blasted Mayor Harold Washington, the Democratic Mayor of Chicago?

Mr. DEVINE. I don't consider it blasting him.

Senator EAGLETON. Was it a love-in article?

Mr. DEVINE. I believe I congratulated him from changing his perspective when he moved from Congress to being a chief executive and realizing in the position of chief executive, he faced many of the same kinds of problems I faced, and he came out with similar solutions to those problems.

Senator EAGLETON. I ask unanimous consent, Mr. Chairman, in the interest of time, that selected quotations from the Devine byline article in the Chicago Tribune of July 1983 be placed at this point in the record as though read, and it is from the Federal Employees News Digest of August 15, 1983.[1]

Senator STEVENS. It is an article by——

Senator EAGLETON. Just the quote; I will not put anything else in but the quotes, taken out of that aforementioned article in the Federal Employees News Digest, OK?

Senator STEVENS. Sounds OK.

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[1] See p. 203.

Senator LEVIN. Would the Senator from Missouri yield---

Senator EAGLETON. Yes.

Senator LEVIN [continuing]. For a unanimous-consent request? I asked Dr. Devine about a paragraph from the American Review of Public Administration which read, "What about civil service? Even with a pared bureaucracy, will Federal employees remain a caricature of inefficiency and the phrase, 'I'm from the Government and I'm here to help you,' an ironic joke on the lack of performance compared to promise."

I would ask that the full paragraph showing the context of that statement be inserted in the record at this time. It shows that indeed, Dr. Devine is not saying that it was an unfair caricature, because he goes on to say, "Why is the civil service inefficient?"

So he is, indeed, stating that the civil service is inefficient and in any event, I would ask unanimous consent that the full paragraph showing the context of this "remain a caricature" remark be inserted in the record at this time, or if it is more appropriate, at the end of my remarks prior to Senator Eagleton continuing his questions.

Senator STEVENS. Very well. Does the Senator's excerpt show the source of the quote?

Senator LEVIN. Yes. It is Dr. Devine's article in the American Review of Public Administration, spring of 1983, page 4.

Senator STEVENS. Thank you very much.

Senator LEVIN. Thank you.

Mr. DEVINE. Can I respond to that? I think as the Senator reads the full context, that it does become clear that when I'm talking about Federal employees, I am talking about a caricature, and a caricature by definition is something that is not accurate and real, and then the next sentence talks about the civil service being an institution, if I remember the quote; that is talking about the institution and not the individuals.

Senator STEVENS. If you want to put some additional excerpts from that speech or the whole speech in the record, it is all right. We want to have a complete record.

Senator EAGLETON. Let's put in the whole speech.

Senator LEVIN. I don't mind.

Senator STEVENS. Very well, the whole speech will be put in.

Senator LEVIN. Can I ask the same for Senator Eagleton on the article?

Senator EAGLETON. Yes, I ask unanimous consent that the whole Harold Washington article be put in.

Senator STEVENS. Very well, it will go in the record, too.

[The speech and the article referred to follow:]

Fulfilling the Civil Service Reform Ideal in the Centennial Year

DONALD J. DEVINE
Director
U.S. Office of Personnel Management

Americans Believe the Government Doesn't Work

Ask Americans how they view civil service and more than two-thirds will tell you that government is overstaffed and overstuffed, that government employees don't work as hard as other Americans and that they waste tax dollars. Ask them to rank 26 occupations in order of efficiency, and Americans will put government dead last.

There is a public perception that government does not work and that perception extends beyond the boundaries of the United States.

"Nobody believes any more that government delivers," concluded analyst Peter F. Drucker. "Looking at modern states . . . I see government obese and muscle bound and having lost its capacity to perform.

Seemingly everybody everywhere is unhappy with the performance of their civil service. In fact, in a surprising display of international unanimity during the 1981 meeting of the Organization for Economic Development and Cooperation, civil service administrators agreed on one point, that regardless of how individual governments were approaching the problem, there remains a widespread demand by the private sector for increased government efficiency and improved levels of production.

But if nobody believes in government *any more*, that means people once *did* believe in their government's ability to perform. So what happened?

The Growing Bureaucracy

Part of the answer lies in Drucker's additional observation that, "In the 19th century nobody worried much about government's capacity (to perform) because it did little and did it well."

Prior to the 1930s the federal government did not intrude greatly into people's lives. There was the Post Office, which functioned well with the enduring image of the mailman who, "Neither rain, nor sleet, nor gloom of night could keep from his appointed rounds." There was a federal bureaucracy but its work was confined to government activities that seldom brought it into contact with the average American citizen. And that was about it.

With the onset of the Great Depression and Franklin Roosevelt's New Deal, however, the entire concept of what the federal government should do, could do, and how it would be done, changed. It became government's role to feed, house, clothe and educate America.

The government started to grow and never stopped as direct service became the rule. The bureaucracy exploded to meet new demands. For each new problem there was a new agency. Suddenly, nearly every facet of American life could be touched by the government so that its employees and civil service were put to the test.

All of which helps answer a big part of the question—the bureaucracy is simply too big and centralized; government is trying to do too much. With the power to act centered in Washington, the resulting conflict in programs and goals, and the layers of red tape which accompany it, centralized government now does a great deal, but it doesn't do it very well—the "obese and muscle bound modern state."

It is this fact which has motivated President Reagan to begin moving programs back to state and local governments, to end excessive federal regulation, and initiatives to move functions back to the private sector. When accomplished, the government will become a leaner and more efficient operation.

But what about civil service? Even with a pared bureaucracy will federal employees remain a caricature of inefficiency and the phrase, "I'm from the government and I'm here to help you," an ironic joke on the lack of performance compared to promise? Why is the civil service inefficient? To answer these questions, we have to look at the inherent nature of government and the nature of the civil service system.

Government Is Different

Government, by nature, is different. It is not a business, there's no profit and loss sheet and no bottom line. The law of supply and demand does not work and there are few limits on the supply of capital and employees. Since government cannot fail as a private business can, employees' salaries will always be paid. So labor need not worry about its demands driving management out of business. A strange environment exists that tends to isolate management from the perils of decision making and labor from responsibility. Clearly, this situation poses unique and difficult problems in regard to administration.

Roy Ash, a man with intimate familiarity of both the government and private sectors, put it this way: "Going from the private sector to the public sector is not like going from the minor leagues to the major leagues in baseball—it's like going from softball to ice hockey."

Or as Columbia University's Dean Sayre was fond of saying, "Certainly there are many similarities between public and business administration—all of them trivial."

Size, Complexity and the Loss of Initiative

The things which are most different about government are its size, complexity and power. In fiscal year 1982 the federal government spent about $100 billion on administration, 78 percent of which went to its 2.7 million employees in 24,500 installations worldwide, working under 2,000 programs organized around 677 management systems. This enormous operation forces an overemphasis on staff (as opposed to line). Thirty percent of the workforce is strictly administrative or clerical—just to bring some rational direction to the far-flung process. Yet the result, as McKinsey & Company's Richard Cavanaugh accurately points out, "tends to straight jacket initiative."

In addition, building a stable civil service, immune from the competitive environment of the private sector, necessarily means a vast array of protections to employees, and civil service rules which standardize procedures for uniformity, but which also immunize the system from initiative and incentive. These special protections can also expand into automatic pay raises and promotions, as well as benefits which are more generous than those in the private sector. The whole system can become isolated from market disciplines.

The Civil Service Reform Act

Government isn't a business. But that doesn't mean it can't be better managed or that the basic *human* principle of incentive, which has worked so well for business, can't work for government. This was the principle which motivated the Carter Administration to propose and pass the Civil Service Reform Act of 1978—the most important modification of the civil service in decades, and the major administrative accomplishment of the previous administration.

In a proclamation celebrating 1983 as the centennial year of America's civil service, President Reagan too endorsed this purpose. He said governing ". . . depends in no small degree upon the contributions of those who make up our civil service. It is built upon the concept that selection of career government employees must be based upon merit principles, the goal being to hire the most capable and qualified people to do the public's work." Those merit principles, based on the century-old Pendleton Act, evolved through a hundred years of experience, but were definitely enshrined only by the Civil Service Reform Act of 1978.

This Act established nine merit principles. Many are familiar with essential protections of fair and equitable treatment of federal employees, protection from favoritism and political coercion, and protection from reprisal for lawful disclosure of information. Less well known are principles requiring: that selection and advancement be determined by ability, knowledge and skill based on fair and open competition; that appropriate incentives and recognition be provided for excellence in performance; that standards of integrity, conduct and concern for the public interest be maintained; that improvement of skills through training be given on the basis of contribution to performance; that employees be retained on the basis of adequacy of performance, inadequate performance be corrected and employees who cannot or will not meet performance standards be separated, and that the workforce be used efficiently and effectively.

In other words, a majority of these principles are intended to place the ideas of ability, incentive, performance, integrity and efficiency into government work. This is a basic principle that transcends presidential administrations and political parties, and that unites America's private sector citizens with their public sector counterparts. These are principles proposed by the previous administration, adopted overwhelmingly by both parties in Congress and which unite two Presidents, two political parties and two directors of the Office of Personnel Management.

The Act first and foremost established an effective performance appraisal system to evaluate each employee's performance. In addition, flexible assignment and incentive systems were established for a new Senior Executive Service corps of elite career executives, and a pay-for-performance system was created for managers. These reforms provided the basis for a new phase of efficient operation of the government's business. Yet, the system still has too many disincentives for good performance.

Strengthening Initiative in Government

The fact of the matter is, the problem is not the people, it's the system. The federal workforce is highly educated, well trained and willing to work, but there are still too few incentives to do so efficiently. The basic structure of the incentive system still deters creative and productive work.

Pay increases are still generally automatic and given to all, based on length of service regardless of performance. Layoffs, too, are still based on seniority, not performance. Generous pensions still create incentives to retire rather than work, with present pay discounted against long-awaited retirement. Pension payments are so attractive that, especially for executives, employees are almost forced to retire just when they reach their most productive age. Incentives, likewise, lead employees to work too much overtime and receive too much premium pay.

In the course of making the civil service fit the unique environment of government, incentive has been removed from the system and efficiency, productivity and responsibility have suffered. Indeed, in a survey of federal workers, a majority said they did not feel they would be held responsible for unsatisfactory work.

Few are rewarded as they should be and few are disciplined. The system has been stabilized, but at the cost of inertia. The system has served as its own worst enemy in creating the public perception that civil servants are a special class with overly generous pay and benefits, who live outside the rules of *working* to achieve greater reward.

The question then is, how *do* we fix it?

A Rational Personnel System

A rational and equitable pay-incentive system that efficiently accomplishes the public's business at the lowest possible cost must be the starting point. Also, in order to be competitive, personnel practices should be comparable with those found in the private sector, and, as made clear in the Merit Principles, performance should be made the key to all personnel decisions. Those reforms are underway.

The Office of Personnel Management has developed a reform package with a clear and straightforward purpose—to fulfill the promise of the Civil Service Reform Act: by making performance the most important factor in personnel decisions and to make the federal government's personnel practices more consistent with those of the private sector.

The biggest proposal toward reaching that goal is the proposed performance-based incentive system (PBIS). Based upon the system instituted for the mid-level managers under the 1978 Reform Act, performance pay will replace current automatic "length of service" pay raises for career federal workers.

As it stands now there is no recognition of individual excellence and no direct link between performance and pay. The least efficient is treated the same as the most diligent, robbing the latter of incentive to keep up his good work. The new system will say, very clearly, "Do a good job and you'll be rewarded for it."

PBIS would put 1.4 million federal employees in a pay-for-performance system for the first time, allowing the best performers in the workforce to receive the largest raises. "Appropriate incentives should be provided for excellence in performance," reads the Merit Principles. PBIS enacts that concept.

A similar performance incentive is also proposed for federal layoff or RIF (reductions in force) procedures. Currently, RIF policies are based on length of service. In addition, there are additional seniority protections allowing more-senior employees to take the jobs of less-senior employees—a process known as "bump and retreat."

These create demoralizing disincentives to less-senior workers who, regardless of how well they are doing their jobs, can either be riffed or bumped from their current positions because they lack seniority. New policies will change RIF criteria, placing more emphasis on performance and limiting bump and retreat.

This reform would recognize that performance is the essential merit element and that the federal government cannot afford to separate its best people, as too often is the case with the present irrational system. For example, the present RIF rules based upon seniority disproportionately separate women and minorities—being the last into their jobs, they tend to be the first laid off. By placing more emphasis on performance than on seniority, women and minorities in the federal workforce, who have proven themselves good performers, will be given a much better chance of keeping their jobs.

Seniority will remain a determining factor in RIF proceedings; it just will not dominate the process, as at present. The highest retention factor in a RIF will remain "tenure," a seniority measure of whether a person has worked three years or more in the career service; and seniority will still be used for retention within the five performance categories.

The generosity of federal pensions is such that senior employees must retire soon after they are eligible. At a pre-retirement salary of $25,000, a federal employee will receive at least $200,000 more over 20 years than a person in the private sector. No wonder employees who would not be considered possible retirees in the business world leave the government in relative droves—the median retirement age for the federal government is 60 for normal retirements, compared to 65 in the private sector.

Combine that with the astronomical cost of the system and you have the absurd situation of the government encouraging many of its best people to leave and going broke doing it. There is a half trillion dollar unfunded liability—half again the total national debt—an obligation of $6,000 for every taxpayer in the United States. Certainly the government doesn't want to deny early retirement, but it doesn't make sense to encourage it!

It is crucial that the government arrest sharply escalating costs of civil service pensions, and return the system to its intended purpose of being supported equally by federal employees and the government. Right now, the great majority (over 60 percent not counting interest, over 80 percent with interest) of the income into the retirement fund comes from the taxpayers. Only this huge subsidy from the treasury keeps the Civil Service Retirement System from collapsing. While a lot of attention has been focused on the Social Security System's problems over the years, the federal pension system has been going out of financial control much more quickly lately. Social Security outlays grew 1,209 percent between 1960 and 1981, while government contributions to the Civil Service Retirement System have grown 2,351 percent. The unfunded liability increased $100 billion in fiscal years 1980-81 alone.

This inequity is resented by many citizens working in the private sector. Federal employees must realize that something must be done to control the federal pension system's costs, and to make the benefits it provides more consistent with those in the private sector. The vast majority of taxpayers, who must work until they are 65 before they can retire at a full pension, should not be asked to bear the tremendous financial burden of supporting a Civil Service Retirement System which allows a federal employee to retire at 55 with full benefits.

The reforms proposed in this area make simple common sense. We propose to move the normal retirement age from 55 to 65, put a limit on cost of living adjustments, increase employee contributions to make them mutually supported by government and employees, and make the benefit formulae comparable to those in the private sector. Employees over age 55 are not affected by the changes, while the effects are gradually played in over the years.

Fulfilling the Reform Ideal

So how much closer will these efforts bring us to fulfilling the civil service reform ideal? A lot.

Through pay based on performance and RIF procedures that better recognize performance, we can reintroduce a basic human principle to the civil service system—incentive. We offer a reason for those who are doing well to do better, we can counsel and better train those who can be improved and we can begin to weed out those who aren't doing a good job. By easing the strong incentive to leave, offered through an overly attractive pension plan, we retain valuable senior civil servants who have the knowledge and expertise needed to effectively run the government. These clearly are vital components in making government more efficient.

The other benefit these reforms hold is that of changing the public's "special status" perception of civil servants. Federal employees will be working under rules for pay and layoffs more closely aligned to and better appreciated by average citizens, giving the private sector a less jaundiced view of the public sector, while benefits are brought down to equivalent levels received by employees working for private firms.

Those three changes, while seemingly undramatic, are monumental steps forward for the federal sector and will go far toward fulfilling President Reagan's promise to "make government work."

Biographical Note

Donald J. Devine is the Director of the Office of Personnel Management (OPM), the central civil service personnel agency for the U.S. Government. Appointed to that post by President Reagan in March 1981, Dr. Devine is the President's principal advisor on federal civil service personnel matters.

Combining a distinguished academic career with active public service, Dr. Devine was an associate professor of government and politics at the University of Maryland and served as Deputy Director for Political Planning and Analysis and as a regional political director for the Reagan-Bush Committee.

The author of several books on politics, including *The Attentive Public, The Political Culture of the United States,* and *Does Freedom Work,* Dr. Devine also has written numerous articles and professional papers.

As Director of OPM, Dr. Devine is responsible for the recruiting, training and development of the federal work force. He also is charged with administering civil service pay and benefits programs, including life and health insurance and the civil service retirement system.

The article presented contains the remarks made by Dr. Devine before a recent gathering of government executives in Washington, D.C., where he reviewed the problems facing the federal civil service and offered recommendations for "Fulfilling the Civil Service Reform Ideal in the Centennial Year."

FORTHCOMING ARTICLES—SUMMER/FALL 1983

Deepening Citizen Participation
Terry L. Buss, Youngstown University

Support for Professionalism in the States
Dennis Daley, Iowa State University

Preparing for City Management Careers
William F. Fannin, University of Houston-Clear Lake

Merit Reform as an Instrument of Executive Power
Ronald D. Sylvia, University of Oklahoma

Public Management Careers—Understanding and Options
James F. Wolf, Virginia Polytechnic Institute

[From the Chicago Tribune, July 20, 1983]

A Change of View for Washington

(By Donald J. Devine)

A year and a half ago I appeared before the House Subcommittee on Manpower and Hiring to explain to members of Congress the reduction in force [RIF] action then underway within the federal government. Rep. Cardiss Collins [D., Ill.] began by asking: "We had a number of witnesses yesterday who testified that the [placement] programs are lousy . . . What do you have to say about that?"

No, it was not going to be a good day. It looked like a duck shoot, with me cast in the role of a duck.

The administration's position was clear. In a broad-based effort to address the nation's economic and financial crises, federal taxes, federal spending and the size of the federal work force was being cut.

It was a new era with the people saying "no" to more taxes and bigger government and demanding that whatever was unnecessary be cut out and what was left be better managed. I simply testified that we were carrying out that mandate given to us by the electorate in the most humane and efficient manner.

One of those at the hearing that day was then Congressman, now mayor of Chicago, Harold Washington.

Rep. Washington was particularly upset over the RIF action. He questioned its handling, its fairness, my motives and the motives of the administration. And while much of his displeasure was directed toward specifics of the action, he didn't like any of it, thought it unnecessary and unfair and felt the President was engaging in political ax-grinding at the expense of federal workers.

Washington was an avid duck hunter.

That, however, was a year and a half ago. Now, I quote from The Chicago Tribune:

". . . more than 1,000 employees could be fired to cope with [Chicago's] financial problems, the city's new budget director-designate said today.

"David Schulz, appointed by Mayor Harold Washington, said his office is conducting a department by department review to weed out nonessential personnel and services in an effort to address the city's financial problems.

The article goes on to say some other interesting things like increasing property taxes "is low on the list" of possible remedies for the financial problems facing Chicago, but the point is clear—Harold Washington has moved from the sport of congressional duck shoots to the real world work of dealing with the demands of the people versus the cost of government.

Mayor Washington is dealing with problems Rep. Washington never had to admit existed and that many members of Congress still won't admit exist—that government costs more than the people are willing to pay. It's real world government facing real world problems and it exists all across the country.

The real point is this: Voters and taxpayers have pulled in the reins. It's one thing to sit in Congress and rail against the President and his programs, but once you get out into the real world you find there has been a change in national mood and direction and as a public official you must respond to it.

That's what President Reagan has been doing in federal bureaucracy, and that's what Mayor Washington is trying to do in Chicago.

Many will say this assessment is all wrong. That in fact the national mood hasn't changed, the people don't want to see these cuts and these actions have been forced on them by the Republicans and the President's policies. But if that's the case why, in Chicago, one of America's most heavily Democratic cities, does the Democractic mayor have property tax increases "low down the list" of possible solutions to his financial dilemma? Because he knows the people won't stand for it.

Now the stock answer is, "They won't stand for it, because the money should come from the federal government." But where do you think the federal government gets its money? From the very same people! And if they don't want Harold Washington raising their taxes, what makes you think they want Ronald Reagan or anyone else raising their taxes?

Senator STEVENS. Who is questioning him?

Senator EAGLETON. I am going.

What do you think of using outside think tanks to run training conferences for new employees, both career and noncareer?

Mr. DEVINE. I believe it is a legitimate way to introduce Government officials to different perspectives about their training opportunities. We use the Brookings Institution and the Heritage Foundation for such activities. We believe we give many different points of view in these and that it is healthy for Federal employees to hear different points of view.

Senator EAGLETON. OK. During your 4 years, have you encouraged the participation of these new employees, career, noncareer? Have you encouraged them in the direction of the Heritage Foundation and discouraged them in the direction of the Brookings Institution?

Mr. DEVINE. No. We have had conferences with both that I have attended.

Senator EAGLETON. Would you supply, from the official files of OPM, the dollars spent in the past 8 years so that we have the full flavor of it? That will balance; that would be Carter and Reagan for the Brookings Institution and the Heritage Foundation year by year. So that would be from 1977 to 1984, how many dollars, year by year, went to Heritage and how many went to Brookings?

Mr. DEVINE. I would be happy to do that for the record.

Senator EAGLETON. We will let that speak for itself. I think it will show, Mr. Chairman, that Brookings is in disfavor, Heritage is in favor. Again, it is Devine, the idealog, emerging.

[The information submitted by Mr. Devine follows:]

U.S. GOVERNMENT MEMORANDUM—OFFICE OF PERSONNEL MANAGEMENT

APRIL 3, 1985.

Subject: OPM Utilization of the Brookings Institution and the Heritage Foundation.

From: Terry W. Culler, Associate Director for Workforce Effectiveness and Development.

To: Donald J. Devine, Director.

During the past four years OPM has not expended any funds for training programs or conferences with the Heritage Foundation. I have been informed by staff in the Office of Training and Development that the Government Affairs Institute purchased books from Heritage for use in training courses. OPM's Library also purchased several books. These purchases have totaled $952.40 over the last four years.

Over the same period of time OPM has worked with the Brookings Institution in several ways. First, a Brookings program for senior executives and high level managers was included in the centrally funded training for OPM employees. During the four year period FY 82-85, $14,345.40 was expended by OPM on that program. Second, we have sponsored conferences and seminars using Brookings for a total cost of $19,243.00. Third, we have purchased books and materials for the Library and for our training programs with a total expenditure of $6,177.06. Thus the total amount spent by OPM with Brookings is $39,765.46.

We know of no expenditures by our regions with either institution.

Other agencies contract with Brookings for specific activities, but that is not cleared with OPM.

Mr. DEVINE. I think, in fact, it will show that the Brookings Institution received very substantially more over both periods and that the Heritage Foundation received nothing in the first 4 years.

Senator EAGLETON. Moving along now into substantive issues, away from politics and as I say, some have been covered. I will try to move as quickly as I can. Pay for performance, previously referred to, a very controversial issue. It was controversial at one time between Senator Stevens and Senator Mathias.

Who is Professor Michael Sanera?

Mr. DEVINE. Mr. Sanera was a professor, I'm not sure of what associate or assistant, at some institution, I believe in Arizona—out west in any event—who later came as a noncareer executive to the Office of Personnel Management. Subsequent——

Senator STEVENS. What was his title when he was under the Devine administration?

Mr. DEVINE. Assistant Director for Planning and Evaluation.

Senator EAGLETON. Assistant Director for Planning and Evaluation.

Are you familiar with a document that Sanera wrote called Mandate for Leadership II?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. How long was this Mr. Sanera with you?

Mr. DEVINE. How long was he with me?

Senator EAGLETON. Yes, in that official capacity.

Does anybody on your staff know; an estimate; was he there a year or two?

Mr. DEVINE. One year, approximately.

Senator EAGLETON. OK, 1 year. According to the Federal Employees News Digest, "A senior OPM official said that 'a careful reading of this document—' "Mandate II" '—will give people a good idea of where we are heading in the next Reagan term.' "

Do you remember that statement in that article?

Mr. DEVINE. No, sir. It certainly isn't mine.

Senator EAGLETON. Senior OPM policy official. There are a lot of higher-ups there.

In this Mandate II, Sanera had a chapter that drew national attention, because it recommended that we keep the liberal bureaucracy in the dark and it also urged the "political executive to quickly identify and reward politically sympathetic staff." Here is a direct quote from this Sanera document: "If the political executive ensures that his political priorities are embodied in the performance evaluation elements of his subordinates and then consistently rewards performance which matches those priorities and punishes performance that does not, he will have an effective instrument for controlling personnel as well as a tool for generating policy change."

Do you remember the publicity over that quote from Professor Sanera in Mandate II, the fellow who was one of your top aides for a year?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. What do you think about it?

Mr. DEVINE. Well, I think Mr. Sanera is entitled to his opinion.

Senator EAGLETON. Yes. What is your opinion?

Mr. DEVINE. I think, first, it is important to note some other things Mr. Sanera said in that, not that I have to defend him. But just to put it in context, he said,

> This part of Mandate II is dedicated to all career Federal employees who, by their daily actions, live up to the highest ideal of the civil service. Nothing in this part of Mandate II should be construed as reflecting negatively on these career civil servants."

At another point he says, "These professionals are indispensable to the operation of Government. Without their expert training and knowledge, Government would be less efficient and more expensive."

In another quote, "Balance in the application of the principles of information control is necessary."

In another quote, "Efforts to establish a constructive relationship with career personnel are an absolute necessity."

I would also like to mention that this item was discussed—we have regularly quarterly meetings with representatives of employee associations—this issue was brought up at one of those meetings. I dissented from many parts of that.

Mr. Bradley Patterson, who was at that time the head of the American Society for Public Administration, said that there are many excellent aspects of Mandate II, but he disagreed with other parts of it.

I believe that there are some positive things in that Mandate II; there are some things, I think, that are inappropriate, and the statement you quoted would certainly fall in the latter category.

Senator EAGLETON. Inappropriate. OK. So you disavow, right? It is not your line of thinking?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. All right.

Well, now, here is a quote, not from you. But here is what a—have you ever heard of the National Academy of Public Administration?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Is that a prestigious group or body?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. They have a president named G. Calvin McKenzie. Have you heard of him?

Mr. DEVINE. I don't know the individual.

Senator EAGLETON. Anyway, he said, in the National Journal of December 15, 1984—Mr. G. Calvin McKenzie, president of the National Academy of Public Administration, a group that Dr. Devine and I both agree is prestigious—that:

> The Reagan administration has taken the political appointment process more seriously than any other administration as a device for implementing their ideological stamp on government. Other administrations have focused on personal loyalty even to the President. In this administration, loyalty has been defined in ideological terms.

McKenzie goes on to cite the appointment of the entire board of the Committee on the Present Danger to National Security posts as an example.

What do you say to that?

Mr. DEVINE. That, of course, falls under the responsibility of the Assistant to the President for Personnel in the White House. It has nothing to do with me, of course.

Senator EAGLETON. But as the head of OPM, you don't think it would be good to imprint an ideological stamp on Government in terms of appointments, in terms of filling vacancies, in terms of filling these close to 3,000 or whatever it was jobs that were inquired into by Senator Gore?

Mr. DEVINE. I believe that a person's policy preferences are one part of a selection process for political appointees.

Senator **Eagleton**. We are still on pay for performance. In the fall of 1983, GAO in its report to you on pay-for-performance appraisal systems seriously criticized OPM for making "very limited evaluation" of agency efforts to implement performance appraisal systems.

Do you remember that GAO report?

Mr. **Devine**. In 1982?

Senator **Eagleton**. In 1983, the fall of 1983. Does anybody on your staff remember that report?

Well, I have got it here. September 15, 1983, GAO report to the Director, Office of Personnel Management, New Performance Appraisals Beneficial But Refinements Needed. I will ask unanimous consent that the whole report—it is not one of the longest, thank God, Mr. Chairman—that the whole report be placed in the record.[1]

Senator **Eagleton**. There are numerous statements that I am not going to take the time to read that are critical, highly critical of Devine's efforts to implement performance appraisal systems. You don't remember the report?

Mr. **Devine**. Yes, I generally remember it. As your quotation says, they found the system generally satisfactory, but needing improvement, which is precisely what I have been saying—that the major effort of the governmental personnel system must be to upgrade the performance appraisal system.

Senator **Eagleton**. What have you done to implement performance appraisal systems? What steps have you taken to heed the criticisms that are in this GAO report?

Mr. **Devine**. The new performance appraisal system, of course, was part of the Civil Service Reform Act of 1978. By statute, they were to go into effect October 1, 1981. The first challenge that really met me as Director was to implement that system for 2 million Federal employees within several months after I was appointed.

Our first efforts, therefore, were to meet the statutory deadline. We were very clear, or we understood very clearly, and I believe I mentioned in my testimony, we recognized meeting that deadline would be difficult and that the system would not be implemented at the highest quality level that first year. That's why we put so much of our stress into reforming that system and upgrading it.

We have done a tremendous amount of training sessions on that; we have met with the departments and agencies; I have met with the heads, Cabinet Secretaries and heads of most of the major agencies, to impress upon them the importance of operating.

We have issued at least two Federal Personnel Manual bulletins upgrading it. In our response to the GAO report sent to this committee and the committee in the House, we agreed with many of the recommendations made by GAO.

I will say that many of those were corrected in the regulations that we worked out agreement on with many of the interested parties and that remain blocked to July 1 of this year. I suspect that we can correct many of those concerns, for example, standardizing the performance appraisal system to five levels, which I believe was one of the recommendations, if not in that GAO report, a similar one.

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[1] See p. 543.

So we basically agreed with the General Accounting Office report. The system has to be upgraded, and there were many elements within the regulations which were blocked that would have achieved those goals.

Senator **EAGLETON**. In the interest of time, we might have agreed with some of the criticisms of the GAO; we disagreed with others and did not implement. That is the short bottom line. You would not be the only administrator, I hasten to add——

Senator **STEVENS**. The law blocks their implementation until July.

Senator **EAGLETON**. He would not be the only administrator that has disagreed, on occasion, with GAO recommendations.

Senator **STEVENS**. I think, Senator, the law blocks their implementation until July, according to my staff.

Senator **EAGLETON**. Yes.

Pay comparability, a new issue. The law requires Federal pay systems to adhere to the principle that "Federal pay rates be comparable with private enterprise rates for the same levels of work."

If such comparable rates are to be determined by the Bureau of Labor Statistics Annual Survey of Private Sector Pay, the President's Pay Agent," that is, Dr. Devine, "can recommend changes in the BLS survey after consulting with employee groups who are a part of the President's Federal Employees Pay Council." BLS surveys larger sized firms in order to find "rates for the same levels of work".

Dr. Devine believes, and the Grace Commission agrees with him, that firms of 25 or fewer employees should be included in the survey. Now, in each of the last 7 years, either the President or the Congress have rejected the percentage increases recommended to achieve comparability as developed by the President's Advisory Committee on Pay.

As a result, the gap between private and Federal pay reported by the Committee has grown very large: 21.7 percent in 1983; 18.3 percent in the last year.

A survey from Hay Associates reported a Federal private salary gap of 10.3 percent, and an overall pay and benefits gap of 7.2 percent.

So far, are you with me? That is pretty fair?

Mr. **DEVINE**. Yes, sir.

Senator **EAGLETON**. OPM rejects these figures. For the period between 1970 and the present, the Congressional Research Service reports that Federal pay has increased by 221 percent. That is, Federal pay has increased by 221 percent, says CRS.

However, according to the CRS during the same period, consumer prices rose 309 percent. Average private sector pay nearly kept pace with that inflation figure, increasing by 291 percent.

So Federal pay went up 221; consumer prices went up 309; private sector went up 291, almost keeping pace. Question: Dr. Devine, you advocate broadening the basis for determining comparability to include the experience of smaller private firms. Why is it your opinion that Federal pay increases should more closely reflect wage increases received by all private sector workers, including small firms, mom-and-pop organizations, rather than the largest companies?

Mr. DEVINE. First of all, I believe that is what the law requires. It says that pay shall be equivalent to pay in the private sector. It doesn't say in the elite firms in the private sector or large firms in the private sector.

Second, the law requires that we study equivalent levels of work in the private sector. I believe that we should be looking at equivalent levels of work regardless of whether it is in a large firm or a small firm. There are, of course, elite in pay in small firms as well as mom-and-pop small firms.

What we are looking for are small firms that have equivalent levels of work. I believe my interpretation is closer to, in fact, what the law requires.

Senator EAGLETON. Who makes the basic determination as to the inclusion of firms, you or BLS?

Mr. DEVINE. The President's Pay Agent makes the basic decisions together with, as you mentioned, the Federal Employees Pay Council. However, through most of our administration and through most of the end part of the Carter administration, they have walked out of the negotiations. So it's basically been just the Pay Agent making the rules itself.

The present survey has been an evolution over a long period of time in which my best reconstruction of what has happened has been, as you mentioned, the executive branch has basically received the pay increases it thought appropriate through the alternative plan or by direct congressional action.

It appears from my best reconstruction of what happened is that the Employees Pay Council was given the ability to define the nature of the survey because the executive branch knew it always had the alternative to come up with a different recommendation.

One of the things that I attempted to do was to get into serious discussions with the Federal Employees Pay Council over how, in fact, we could change the survey methodology so that we could come out with a process that could be looked at as fair on both sides.

Unfortunately, as we got involved in what we believed were serious discussions on the matter, the Federal Employees Pay Council did not believe that further discussion would be fruitful, so they ended discussion on the matter.

In our last President's Pay Agent report, we have recommended that major changes in the scope of the survey be made. We believe that when they are implemented, it will take several years to do it, but we will have a more credible pay survey.

I believe even if those changes are made, however, that it wouldn't be fully representative, but it would be closer. For example, the law does not allow us to survey State and local governments, which have many similar kinds of jobs to those in the private sector.

It also does not allow us to go by locality pay for white-collar occupations, unlike the way it does for blue collar, which we think would make it more representative still.

So we believe that to achieve true comparability, we would need some changes in the law, although if we made the changes in the nature of the survey that we suggested, it would be closer to a true approximation of the pay in the Government as opposed to pay in the private sector.

Senator EAGLETON. I may be in error, but correct me if I am. Last year, with BLS' cooperation, wasn't the survey expanded to include State and local government employees?

Mr. DEVINE. No, sir.

Senator EAGLETON. No? OK. Now, have you talked to BLS about this 25 or fewer employees?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Did you talk to Mrs. Norwood and any of her professional people?

Mr. DEVINE. We have had discussions.

Senator EAGLETON. What do Mrs. Norwood and her professionals tell you about the inclusion of firms with 25 or less employees?

Mr. DEVINE. She sees some implementation difficulties, but——

Senator EAGLETON. She certainly hasn't blessed it, has she?

Mr. DEVINE. Well, she hasn't opposed it. I believe she has some concerns about whether she can do it within the resources that they have available.

Senator EAGLETON. I had some questions on the quit rate, Mr. Chairman, but Senator Chiles probed on that. I had a question or two, but I will move on.

Let's get into this area of retirement and unfunded liability, OK?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Now, you publicly say that the unfunded retirement liability is $500 billion, right?

Mr. DEVINE. Approximately, yes.

Senator EAGLETON. Approximately. You have said that time and again during your career, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. However, for interest payment purposes, OPM assumes only a $260 billion liability. So my question is this: If $500 billion is the right amount and you say it time and again, why don't you request interest payments on $500 billion?

Mr. DEVINE. We have a very, very unusual system in which the largest part of the contribution comes from Governmentwide payments based on what we call the 30-year payment and the interest on unfunded liability. It is a carefully worked out formula. Its purpose is to assure current payments out of the retirement fund.

We believe that the present system has been so jerry-built over the years that if we could make the changes recommended in the President's budget in the present retirement system, that we should leave that as a problem of the past—to pay off those who choose to remain in that one, and to build a new retirement system for employees hired after January 1; and those present employees who would like to switch to it can start over again.

Senator EAGLETON. I understand, Mr. Devine. It is a very simple question. Time and again, you say the unfunded liability is $500 billion, or thereabouts, you say, roughly half a trillion. Yet OPM assumes only a $260 billion liability for interest purposes.

If it is $500 billion, why don't you pay interest on $500 billion?

Mr. DEVINE. Again, it is a result——

Senator EAGLETON. If it is $260 billion and that is what you pay interest on, why don't you clean up your act and say the figure is $260? Why do you use one figure for public harangues and another figure when it comes to hard bucks?

Mr. DEVINE. Because the Congress required that we express, for Congress' purposes, a more accurate estimate of what the unfunded liability is, and the Board of Actuaries of the civil service retirement system—which I might mention none of whom I have appointed, they are all from previous administrations—also says——

Senator EAGLETON. All right. Would this be fair? You say it is a half a trillion, but the fact is that interest is based on $260 billion. Is that a fair statement?

Mr. DEVINE. Interest and other funding mechanisms interact with the interest payment to make a very complex funding process.

Senator EAGLETON. Is interest paid on $500 billion?

Mr. DEVINE. No, sir.

Senator EAGLETON. Is interest paid on about $260 billion?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. OK. You could have said that 5 minutes ago.

OK. Mr. Devine, are you familiar with a firm called Towers, Perrin, Forster & Crosby?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Henceforth, they will be called TPF&C. Did you contract with them to do a study of the retirement system?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. What did you pay them? Does anybody know?

Mr. DEVINE. I have no idea.

Senator EAGLETON. Does anybody know? Does anybody in the room know?

Mr. DEVINE. About $200,000.

Senator EAGLETON. OK. Why were you so surprised to find—when did that report come in? What year? Just recently, didn't it?

Mr. DEVINE. 1984, late 1984.

Senator EAGLETON. Late 1984, so you had been in office roughly 4 years in December.

After that report came in, why were you so surprised to find that most employees received no benefits from the retirement system? You didn't know that before the report?

Mr. DEVINE. Well, I knew it in kind of a general way. It is a very interesting thing. There is a concept called the normal cost, entry age normal cost of a retirement system. Whenever I asked the actuaries, whether they were in OPM or outside, what that meant, they would only give that number, and no matter how you challenge them to look at it differently, you can only get one number out of the system.

One of our very brilliant policy analysts, a career individual, finally made what I consider a major conceptual breakthrough in looking at normal cost, looking at it as differentiated normal costs with different segments of the population.

It seems that it should be an obvious concept, but it literally took me several years to keep continually rephrasing the questions so that they could look at it other than as actuaries traditionally have looked at the concept.

Yes, we have kind of always known that individuals who stay in short periods of time must be subsidizing the system, but we didn't know what percentage, and we couldn't deal with it in a normal cost terminology. It was based on the breakthrough of one of our excellent staff members that TPF&C was able to look at the retirement system for the first time in a disaggregated way.

Senator EAGLETON. This TPF&C, they're a good firm, aren't they? You picked them and you paid them $200,000. They are good folks, aren't they? Knowledgeable?

Mr. DEVINE. Yes, as far as I know.

Senator EAGLETON. Now essential to their report, one of their key recommendations was that you should proceed with a defined benefit section of the plan, but you don't like that. You prefer a defined contribution. Is that correct?

Mr. DEVINE. Yes, sir. The greatest, and again, I mentioned the path-breaking nature of this idea of looking at the fund in a disaggregated manner.

The fact of the matter is that the defined benefit plan would not deal with the main problem that they recognized. That problem was with relatively short-term employees, at least in any normal definition that I have seen of defined benefit plans. Though we looked at and took their recommendation very seriously, we believe it was inconsistent with the major finding of their study that the present system was dealing with different groups in very different ways. Presumably, that could be done under some defined benefit proposal, but frankly, I was very attracted by part of Senator Stevens' proposal which had defined contributions attached to it.

Senator EAGLETON. I'm just trying to clarify. I am not going to debate the merits here now. But you like defined contribution, and TPF&C—you hired them, you paid them $200,000—they recommended a defined benefits section of the plan. That is a simple yes or—the answer is yes.

Mr. DEVINE. My staff says that they made some favorable comments about several different approaches. But regardless, even if they had concluded that a defined benefit would be the way to go, the main purpose of the study was to do the analysis and to set the numbers as a given. Then we could all be talking about roughly the same numbers about the values of the different approaches.

Senator EAGLETON. I ask this, Mr. Chairman, to be supplied for the record in 10 days. I ask Mr. Devine, and his staff, to take the TPF&C study—and the committee has a copy of the study—and to note, in a memo attached to it, the areas in which Mr. Devine disagrees with the TPF&C statement. For instance, when they talk about defined benefits section of the plan, he puts his critique on it and says, I dissent, I disagree on this because of the following.

Senator STEVENS. I'm not so sure, Senator, that that is possible insofar as clearance from the Office of Management and Budget. We are trying to work out this plan right now.

Senator EAGLETON. It is not possible that he can comment on a report, a study, a firm he hired, he paid them $200,000, and he can't comment on the firm of his own choice?

Senator STEVENS. I will leave it up to him.

Senator EAGLETON. Can you, Mr. Devine?

Senator STEVENS. I think there are some problems about clearance and the viewpoints of the administration with regard to that plan at the present time.

Mr. DEVINE. As I remember it, the TPF&C report does not come down very hard on any particular approach. I wouldn't have to be disagreeing with it. It would be basically factual questions.

Senator STEVENS. You want his commentary on it rather than a clearance procedure?

Senator EAGLETON. No, no, commentary, Devine commentary.

Mr. DEVINE. We would be happy to do that, sir.

Senator EAGLETON. And get it to us within 10 days.

[The information referred to follows:]

ASSESSMENT OF THE WORK PERFORMED BY TOWERS, PERRIN, FORSTER & CROSBY FOR OPM UNDER CONTRACT NO. OPM 18-84

TASK I. REVIEW OF NON-FEDERAL RETIREMENT PRACTICES AND COSTS

Towers, Perrin, Forster & Crosby (TPF&C) provided extensive data on retirement practices in the non-Federal sector. The information was developed through an analysis of non-Federal retirement plan coverage, provisions, benefits, and costs.

OPM believes that the analyses developed in this task were based on a statistically valid sample of non-Federal retirement systems and are considered to provide adequate non-Federal data for use in the design of Federal retirement systems.

TASKS II & III. TECHNICAL ASSESSMENT OF DESIGN OPTIONS FOR CURRENT AND NEW EMPLOYEES

I. Overview

The TPF&C report constituted a technical analysis of the Civil Service Retirement System [CSRS] and of various alternatives. The report measured the alternative retirement plans against an objective set of criteria, compared them with one another, and addressed the transition provisions which would affect the current workforce. OPM believes that the criteria and methodology employed, the summary of distinguishing characteristics, and the costs and benefits of various alternatives provide a reasonable base of technical support for further work in the area of Federal retirement plan design. As a technical assessment of alternative plans against an objective set of criteria, the TPF&C study makes no recommendations with respect to a preferred plan or plan design.

II. Background

A. *Introduction.*—The introductory section simply provides the basic framework for the conduct of the study in terms of focus and areas of emphasis.

OPM believes the approach taken to be reasonable.

B. *Employee demographics.*—TPF&C, in this section of the report, sets forth the demographic assumptions based on factual information and certain estimates made from the actuarial experience analysis conducted for the Fifty-Seventh Annual Report of the Board of Actuaries.

OPM appreciates the criticality of demographic data to the design of a new retirement system or modification to the current system. OPM now possesses updated data as a result of the most recent five-year valuation of the CSRS.

C. *Objectives of the study.*—TPF&C used the following evaluation criteria in accomplishing its technical analysis: (1) recruitment and retention; (2) benefit adequacy; (3) normal cost and distribution of benefits; (4) typical non-Federal plan practices; (5) administrative implications; and (6) new effect on the Unified Budget and on normal costs.

OPM believes these are reasonable criteria for evaluating current or proposed retirement systems.

III. Analysis of Comparative Data

A. *Recruitment and retention.*—TPF&C analyzed the impact of such factors as plan type and plan features in assessing the relative recruitment or retention value of various retirement plans.

OPM believes that the recruitment and retention value of a retirement program is a function of both the benefits provided (including ancillary benefits) and how they are perceived by employees and thus appreciates TPF&C's assessment of the need for a well designed, informative communications program to establish a proper understanding of a retirement system in the eyes of employees.

B. *Benefit adequacy.*—The study concludes that benefit adequacy is one of the most complex and value-laden areas of retirement system design and points out that there is no commonly accepted definition of benefit adequacy, much less any universally accepted measurement criteria for determining whether "adequacy" is being achieved.

OPM recognizes that several measures should be used to gauge benefit adequacy.

C. *Normal cost of retirement system and distribution of benefits provided.*—In this section of the report, TPF&C introduced measures believed to be useful in comparative analyses of the overall level of system benefits with particular emphasis on the percentage of payroll which should be set aside each year for a group of new workers to fund, together with interest income, the future benefits specified by the system (normal cost).

OPM believes that the TPF&C assessment is reasonable and that the findings pertaining to the distribution of individual normal costs for those workers who withdraw prior to reaching full retirement are particularly important to an understanding of the inequitable distribution of benefits which characterizes the current CSRS.

D. *Consistency with typical non-Federal retirement plan practices.*—TPF&C used a statistically representative sample of non-Federal retirement plans to derive a prototypical (as opposed to average) private sector retirement system for purposes of comparison with CSRS and various alternatives. Consequently, the resulting "typical" plan is an above-average plan and TPF&C adjusted employer practices to more realistically present appropriate comparisons.

OPM recognizes that TPF&C chose each provision in its prototypical plan based on that provision being individually the most representative and believes TPF&C's adjustments are reasonable.

E. *Administrative impact.*—TPF&C identified the following features as impacting on the administrative environment: type of plan; early retirement provisions; benefit accrual formula; vesting provisions; and cost of living adjustments.

OPM believes that the features identified by TPF&C are reasonable for measuring administrative impact but also recognizes that legislative amendments and diversity of covered groups may be additional complicating features in any Federal retirement system.

F. *Effect on the unified budget.*—The report by TPF&C assumed that since the current CSRS is included in the Unified Budget of the United States, any modified CSRS or alternative system will similarly be encompassed within that Budget.

OPM believes that this is a reasonable assumption and that budgetary impacts should be analyzed on both a short and long term basis.

IV. Study Results

In this section of the report, TPF&C provided a detailed technical analysis of CSRS and the various alternative systems that were under active discussion at the time the contract was awarded in terms of (1) recruitment and retention; (2) benefit adequacy; (3) normal cost of retirement system and distribution of benefits provided; (4) consistency with typical non-Federal retirement plan practices; (5) administrative impact; and (6) effect on the unified budget. Each alternative was evaluated independently.

A. *The current civil service retirement system.*—TPF&C correctly identified the COLA and early retirement provisions of CSRS as features most unlike those found in non-Federal plans.

B. *Modified status quo.*—TPF&C's analysis is reasonable and correctly notes that this alternative was drafted prior to the 1983 Social Security Amendments and is, therefore, not an option for new employees.

C. *The integrated defined benefit plan.*—This alternative is a combination of defined benefit and defined contribution plans and the analysis of this option in the context of the six comparative criteria is adequate.

D. *Senator Stevens' proposal.*—TPF&C performed a reasonable analysis of the original proposal advanced by Senator Stevens (introduced as S. 2905) and noted its strong recruitment appeal.

E. *The modified Stevens' proposal.*—This alternative embodied modifications to S. 2905 outlined by OPM as a basis for analyzing a range of system design options and the technical analysis accomplished by TPF&C is a realistic assessment of such a plan.

F. *Congressman Erlenborn's proposal.*—TPF&C's analysis of this alternative was reasonable, given the enormous complexity of the overall concept.

G. *The National Committee on Public Employee Pension Systems [PEPS].*—TPF&C's technical analysis of this proposal—which was intended to provide greater total compensation equity between the public and private sectors and consistency with Social Security—was adequate.

H. *The President's Private Sector Survey on Cost Control (Grace Commission).*—TPF&C performed a technical analysis of the Grace Commission proposals which were designed to provide a more comparable retirement system to that in non-Federal practice. TPF&C correctly noted that the Grace Commission did not attempt to develop a completely new system but recommended changes to the current CSRS.

Senator STEVENS. We are going to have to talk about this record here before we are through in terms of the deadline for submission.

Senator EAGLETON. Regardless of what happens tomorrow afternoon, we are not going to be on the floor for 10 days. We have Easter recess, days to write the report.

Senator STEVENS. There is an Easter recess coming up. I want to define what 10 days is.

Senator EAGLETON. Ten legislative days in session.

Senator STEVENS. We won't be in session.

Senator EAGLETON. For Easter. I want 10 calendar days.

Senator STEVENS. Excluding——

Senator EAGLETON. Excluding Easter Sunday.

Senator STEVENS. Excluding Friday and Monday.

Senator EAGLETON. All right. Excluding Good Friday, Easter Saturday and Sunday, excluding them.

Mr. DEVINE. I would much prefer to be able to do it as the Director.

Senator EAGLETON. As Director. [Laughter.]

Senator STEVENS. He doesn't have a job right now.

Senator EAGLETON. You are emeritus, right? [Laughter.]

Well, can you do it as a once-informed observer who held the job?

Mr. DEVINE. I certainly can, with hope we will take a vote on it before then so one way or another, I will be happy as the Director of OPM.

Senator EAGLETON. Can you do it as Executive Director to the Acting Director?

Mr. DEVINE. We will do it in any event.

Senator EAGLETON. Let's move on here and see what we have, work force reduced. In your speeches, you constantly brag that the work force was reduced by 75,000 jobs during the Reagan administration's first term. Based on your own figures, between April 1981 and January 1985, while nondefense civilian employment declined by 81,000, defense civilian employment increased by 85,000 for a net increase of about 3,443.

Can you explain why there is a difference between the figure that you claim in your speeches and the reality as recited in these figures?

Mr. DEVINE. I always stress that we are talking about nondefense reduction.

Senator EAGLETON. Do you let the audience have a little hint that there is such a thing as defense civilian employment ?

Mr. DEVINE. Since I always use the term nondefense, I would presume people recognize that the thing that isn't nondefense is defense.

Senator **Eagleton**. Would it be possible in some speech to also say I am bragging about all that I cut, but you ought to see the number that Weinberger has over there. Could you throw that in?

Mr. **Devine**. Well, the President has been very clear since he was campaigning in 1980. His plan is to increase defense and to decrease nondefense. There has never been any secret about that.

Senator **Eagleton**. OK. It is no secret, but you know, we get your speeches and press releases, and we see that 75,000 figure, and the public out there believes Mr. Devine, boy, they have really cut the skivvies out of the Federal work force.

But boy, Weinberger has added, for every one you have cut, Weinberger has added one and a shade bit more, 3,443.

Can we agree these are the cuts in some of the departments just to have it for the record? For instance, has the civilian number of employees at the Department of Education been cut 26 percent? Is there some staff here that can help you? Twenty-eight percent cut in Education? That is what we have? Is that about right?

Mr. **Devine**. That would be approximately. I think the last figure I have is 24 percent.

Senator **Eagleton**. All right. Between 24 and 28 percent. How about HUD? I have under 25.1 percent.

Mr. **Devine**. Twenty-two I have. But you're in the same ballpark.

Senator **Eagleton**. All right, 22 to 25. How about HHS? I have 4.9.

Mr. **Devine**. I don't have all those figures here, but that sounds about right from my recollection.

Senator **Eagleton**. I see. There are others: Ag; Commerce, 20 percent. Do you ever talk to the Chamber of Commerce and tell them you cut their department 20 percent?

Mr. **Devine**. Commerce is a little misleading since an agency was moved out of it.

Senator **Eagleton**. I understand that. Old Herby Hoover made it into something.

OK, but Education was whacked away at; HUD whacked away at; all these others whacked away at; and I repeat, Weinberger hires the civilians as fast as you fire them.

All right, another subject. Temporary employment. Is it not the case that there is a new Devine definition of temporary employment which has the effect that someone can be in temporary employment status for up to 4 years?

Mr. **Devine**. Yes, sir.

Senator **Eagleton**. That is new under you? Scotty Campbell didn't have that?

Mr. **Devine**. It could be extended for 4 years, but it would have to be done by OPM on an exception basis. It was very much the exception.

Senator **Eagleton**. Under Campbell, very much the exception; under Devine, the standard rule.

Mr. **Devine**. It falls under our general principle of delegating authority to agencies rather than having to come in for approval to OPM.

Senator **Eagleton**. If you are temporary, you get no health protection?

Mr. **Devine**. No, sir.

Senator **Eagleton**. You get no other benefits so-called permanent employees get?

Mr. **Devine**. That is correct.

Senator **Eagleton**. So you keep these temporaries hanging by their thumbs for 4 years, don't you?

Mr. **Devine**. Many people prefer temporary employment. Many people——

Senator **Eagleton**. Can you bring me some employees who will come before this committee and tell me that they prefer not having health benefits; they prefer not having other benefits that go to permanent employees? Are there a bunch of workers that prefer not to have these benefits?

Mr. **Devine**. Yes, sir. There is a great deal of information on this area which I would be happy to send you.

Senator **Eagleton**. Information. That is Devine ideology again. I am talking a working stiff, a man or a woman trying to raise a family, and you are going to tell me that there are just lots of these workers jumping with joy because they don't have benefits? Now come on, Mr. Devine.

Mr. **Devine**. There are many women who, studies have shown, in making the transition between the home and the work environment, prefer temporary employment, even if it pays less, to make that transition easier for them. There are many people who are developing skills, young people, who believe that they would rather take a chance on a temporary position without committing themselves to a long-time obligation.

This is very well known in the temporary employment field. It is one of the largest growing fields in employment in the private sector as well as the Government—not growing in the Government, which is one of the reasons why we changed the policy.

In fact, it had been declining in the Government.

Senator **Eagleton**. How many temporary workers are hired competitively?

Mr. **Devine**. All temporary workers are hired competitively, about 250,000 in a year, 230,000.

Senator **Eagleton**. If the Denver regional director—he being a legitimate employee of the department as distinguished from your five henchmen— the Denver regional representative told Congresswoman Schroeder, who testified here against you yesterday, that only 4 to 6 percent of the temporary employees were hired competitively——

Mr. **Devine**. I believe——

Senator **Eagleton** [continuing]. Would that Denver representative be misrepresenting him or herself to Congresswoman Schroeder?

Mr. **Devine**. Well, the regional representative, I would be surprised if she was communicating with Mrs. Schroeder.

Senator **Eagleton**. I can't hear you.

Mr. **Devine**. I would be surprised if she was communicating with Mrs. Schroeder, but I believe what you have in mind is whether the appointment is done through a register or not. Is that correct?

Senator **Eagleton**. Sorry?

Mr. **Devine**. I believe what you have in mind is not whether it is done competitively but whether it's done through a competitive register.

Senator **Eagleton**. Isn't that a very important ingredient of the competitive process?

Mr. **Devine**. The temporary employees, there is such a demand for that that we can't keep registers for them as we can for many others.

But the agencies and——

Senator **Eagleton**. Do you know why that is? See, you have got so many of those people assigned to servitude and you make them temporary by definition and you give them no health benefits, and a lot of them leave. I would leave as soon as I could get my fanny out of there. I would leave. And you take delight in it. You are proud of it.

Mr. **Devine**. I am talking about demand to get in, sir.

Senator **Eagleton**. But there are a lot of people getting out.

Mr. **Devine**. If it is getting so bad, how come so many people come in?

Senator **Eagleton**. People take the very first opportunity to get away from your definition of temporary and no benefits.

Mr. **Devine**. That is their idea.

Senator **Eagleton**. You love them to leave.

Mr. **Devine**. No, sir.

Senator **Eagleton**. You love them to leave.

Mr. **Devine**. No, sir, not at all.

[Letter submitted by Congresswoman Schroeder to Senator Eagleton follows:]

NINETY-EIGHTH CONGRESS

PATRICIA SCHROEDER, COLO., CHAIRWOMAN

MORRIS K. UDALL, ARIZ.
KATIE HALL, IND.
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U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
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Washington, D.C. 20515

TELEPHONE (202) 225-4025

April 3, 1985

Senator Thomas Eagleton
United States Senate
Washington, D.C. 20510

Dear Senator Eagleton:

Please find enclosed a copy of a memorandum filed by the Staff Director of the Subcommittee on Civil Service with the Chairman of the Committee on Post Office and Civil Service concerning staff inspections of Office of Personnel Management Regional Offices in Denver and Chicago in February.

In the fourth paragraph of the second page you will find the fact that only 4% to 8% of temporaries hired in the Denver region are hired from competitive registers.

Please let me know if there is any further information I can provide to you.

With kind regards,

Sincerely,

Pat Schroeder
PATRICIA SCHROEDER
Chairwoman

enc.

March 25, 1985

To: Chairman Ford

From: Andrew A. Feinstein, Staff Director, Subcommittee on Civil Service

Re: Report on OPM Regional Office Visits in Denver and Chicago

I visited the Denver and Chicago regional offices of the Office of Personnel Management (OPM) on my return from Subcommittee hearings in Denver. In Denver, on March 18, Anne Simon of the Minority Staff, Cyndy Yeast of Rep. Schroeder's district office, and I met with the following OPM officials:

Robert Dunn	Regional Director
John Ehlers	Deputy Regional Director
Pat Seacrest	Director's Reg. Representative
Joe Deloy	Head, Staffing Services
John Thorland	Head, Agency Compliance

In Chicago, on March 19, I met with the following OPM officials:

Steve Cohen	Regional Director
Brian Carey	Director's Reg. Representative
George Becker	Head, Staffing Services
Linda Peterson	Head, Agency Compliance

I asked questions concerning three general issues in each city:

1. OPM's staffing function, with special reference to the withdrawal of delegations from agencies, the use of Schedule B hiring authority for positions previously filled by use of the Professional and Administrative Career Examination (PACE), and the appointment of employees on a temporary basis, pursuant to a Federal Personnel Management (FPM) letter of January 2, 1985.

2. The compliance and evaluation functions of OPM, with particular emphasis on the new wholesale, data-driven evaluation methodology which replaced the retail case-by-case method of the past, and the monitoring of temporary appointments.

3. The role of the five regional representatives of the Director, how these regional representatives interface with Regional Directors, and whether they have engaged in partisan political activities in violation of the Hatch Act.

In the area of staffing, OPM has been withdrawing the delegations of authority previously granted to agencies under the provisions of 5 U.S.C. 1104. Under a FPM letter of March 10, 1982, narrower circumstances under which examining authority could be delegated were set out. This FPM letter phased in the withdrawals over three years, a period soon coming to an end. The Regional Director in Chicago, which had been the leader in delegating authority, estimates that before the 1982 FPM letter, some 45% of positions in the region were subject to delegated examining. After the phase-in period is completed, approximately 25% of positions will be in that category.

The withdrawal of delegated staffing authorities has meant an increased workload for regional offices, which has been met through some slight staff augmentation and greater automation of exam scoring. Agencies, which by and large resisted the delegations initially, are upset about losing their direct hire authority. Some claim OPM doing the staffing work causes delay. The agencies may also feel that they have less control over whom they hire, although if they are performing the task correctly, they should end up with the same appointees as when OPM does it.

Neither regional office reported any major increase in temporary hiring due to the FPM letter. The Denver region traditionally has a large surge of temporary hires in the summer among natural resource agencies, such as the Park Service, the Forest Service and the Bureau of Land Management. In the Denver region, only 4% to 8% of temporaries are hired from registers. The rest are hired from applicant supply files. Agencies are supposed to use crediting plans and select the best qualified after adding veterans points. OPM does not check up on the agencies, so whether agencies use proper competitive procedures to hire temporaries or not is unknown. OPM has issued no instructions to monitor the new temporary hiring authority. While competitive selection is only of some significance for summer hires, it is of considerable importance for temporaries who can be hired for up to four years. Mr. Cohen pointed out that few good people are willing to take temporary positions which lack many of the benefits of permanent jobs.

The first group of individuals hired for 2 years under the Schedule B hiring authority for PACE-type jobs are now completing their term of appointment. In both regions, a few have been able to successfully compete for permanent positions. At Wright-Patterson Air Force Base, however, the Air Force has to appoint some veterans who ranked higher on the register to be able to reach the Schedule B applicant, who they wanted to hire. The Schedule B appointees are generally competing for GS-9 positions, so the two years of specialized experience they had should win them the job over an inexperienced 5-point veteran. However, the experienced Schedule B applicant will always lose out to a minimally qualified 10-point veteran and a somewhat qualified 5-point veteran. The Department of Defense, in particular, has bemoaned this situation because, they will have wasted two years of training where they cannot hire the Schedule B appointee. Still, the number of Schedule B, PACE-type appointees in the regions is very small. These Schedule B appointees can be retained as temporaries after their terms expire.

The Agency Compliance and Evaluation function underwent a major change in fiscal year 1984. Before that time, two or three evaluators would spend two weeks at an installation and would review all the personnel management operations of the facility. They would perform desk audits of specific jobs to determine whether they were properly classified. Only a small number of installations would be covered in a year. Under the new approach, OPM selects, on a random basis, 20% of the installations in each region. OPM asks for copious data before the visit and then sends one or two evaluators on site for a day. There is no more case-by-case review of job classifications and no more detailed file searches. Further, the analysis of the data has, in large measure, been centralized in Washington. The new methodology looks at whether systems are in place and less at the specific outcomes. This year's one or two day reviews cover position management, internal and external staffing, performance appraisal, discipline, and the linkage between performance and awards. OPM still pursues specific complaints and decides classification appeals, but no longer solicits this type of work. In Denver, 200 positions were audited in 1983. None were in 1984.

Agency complaints about the data requirements have died down this year after OPM reduced its demands. OPM officials seem happy with the new program, although they admit that their systemic work fails to catch as many classification errors. Instead of producing book-length evaluations, as in the past, evaluators now produce 2 page reports. Obviously, the new methodology is cheaper. As agencies become aware of it, they have increased ability to hide their shortcomings from OPM. OPM officials claim that this is not a problem.

What the Director's Regional Representatives do is an issue of greater concern. There are five GS-14 full-time Schedule C regional representatives in the country, each covering two regions. They are supposed to be the primary liaison points with the Federal Executive Boards, the press, and the Congress. They have no line authority and report to the Director, through Chip Dutcher, who is head of the Executive Secretariat. They got their jobs through the White House Personnel Office. They talk among themselves once a week in a conference call. Each region has two or three Federal Executive Boards, which may meet monthly. The Regional Representatives claim not to promote the Administration's program.

Clearly these officials are subject to the Hatch Act. Nevertheless, Mr. Carey in Chicago conceded that he advanced Director Devine's visit to Rep. Albosta's district during the campaign, a visit which allegedly involved Dr. Devine speaking out against Rep. Albosta's reelection. Mr. Carey said that Dr. Devine spoke to the Rotary and talked to newspapers and the Chamber of Commerce. Mr. Carey did not think that Dr. Devine did any campaigning.

The regional representatives said they spent about 20% of their time in travel status. Also, the regional representatives are involved in planning and promoting a series of conferences, jointly sponsored by OPM and OMB on contracting out under OMB Circular A-76.

Senator EAGLETON. All right, affirmative action. Do you remember back in 1981 you and I had an exchange about your views on affirmative action, right?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. I questioned you about a sentence in your 1978 book calling for revocation of affirmative action plans, and you explained that there was a difference between expressing political philosophy in a book and works of action.

Remember that?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. You are aware of the rather unremarkable evaluations of OPM's affirmative action record during your term.

Mr. DEVINE. No, sir.

Senator EAGLETON. Based on your record, it looks like your political philosophy and your actions on the job are, in fact, identical; that you have acted, really, on what you wrote in 1978.

I would appreciate your comment and specifically your explaining to the committee, specifically, the ways you tried actively to advance the goals of affirmative action and why your progress has been so negligent.

Mr. DEVINE. Actually, our progress has been very substantial. In 1980, before I entered office, about 21.8 percent of the employment was for minorities in the Government. That has gone up to 23.4 percent in 1984, a 7-percent increase. That percentage has increased from 11.6 percent in professionals to 12.9 percent; for administrative occupations, from 14.2 to 18.2 percent.

We believe that our record, in fact, has been very sound in this area. I think the results show that. The figures I just reported were for white-collar employment.

If you look at blue-collar employment, you will see an increase from 29.7 to 31 percent, again, an increase of about 7 percent. I believe my record is very clear here and that we have shown very substantial progress during this administration.

Senator EAGLETON. With respect to women in the highest paying jobs, what progress has been made with respect to women in the highest paying jobs? I am not talking about——

Mr. DEVINE. I am glad you mentioned——

Senator EAGLETON [continuing]. Lady maids cleaning up buildings. OK, highest paying jobs, women.

Mr. DEVINE. Yes, that percentage has gone down, and that's gone down for one good reason.

Senator EAGLETON. Let's understand——

Mr. DEVINE. Can I answer the question?

Senator EAGLETON. Let's understand the definition of words, because we had this down and up business with Senator Gore. Down means down. There are fewer women in higher paying jobs than there were before.

Go ahead.

Mr. DEVINE. Yes, it went down from 23.9 percent in professionals to 19.2 percent. The reason for that is very, very clear, and that is because the present reduction-in-force regulations are based upon seniority and women have half of the seniority that men do.

These changes have been taking place by women being bumped out of the professional higher paying occupations into the lower occupations and that would not have happened if our reduction-in-force regulations that were blocked by Congress were in effect.

Senator EAGLETON. One question on handicapped. Dr. Devine, prior to your arrival, OPM used to provide Governmentwide data for all agency-wide vacancies for Schedule A handicapped positions. Schedule A allows hiring without examination or centralized competitive procedures.

Such information was provided by specialists and the OPM Federal Job Information Centers. A call to the Washington area FJIC reveals that information on Schedule A job vacancies is no longer available. The person responsible for handicapped information was RIF'd in 1983. Asked how an individual can obtain information on Schedule A handicapped vacancies, the OPM reply out of FJIC is "to call each agency."

Asked which agency may have vacancies, the reply was that FJIC just doesn't know. Thus, the potential applicant must do an agency-by-agency search for handicapped job vacancies.

This is attributable to the RIF that took place in 1983. Can you comment on that?

Mr. DEVINE. Yes, sir. You will be pleased to know that a Democrat, Marion Barry, named me Handicapped Public Employer of the Year last year, and I am very proud to have received that honor from the District of Columbia.

I am not aware of that particular situation, and I will be very happy to check it and provide information for you on that.

Senator EAGLETON. All right. Would you look into that?

Now, let's see. Could one of your folks look into that and get us one page in writing by noon tomorrow?

[The information referred to follows:]

United States Government
MEMORANDUM

Office of Personnel Management

Subject: Effect on Handicapped Employees of Supposed Abolition of Coordinating Position in the Washington Federal Job Information Center

Date: APR - 3 1985

In Reply Refer To:

From: Terry W. Culler, Associate Director for Workforce Effectiveness and Development

Your Reference:

To: Donald J. Devine
Director

My staff and the Staffing Group have addressed the question of whether or not OPM abolished positions specifically designed to aid handicapped employees in locating Schedule A appointments across the Government, making it necessary for these individuals to go to each agency to uncover job opportunities. In 1982 a reorganization took place in OPM which affected the JIC. Even prior to that however, there had been no individual designated as the "handicapped coordinator." Handicapped employees were processed and referred to positions in the government for which they were qualified. This continues to be the case today. When a handicapped applicant comes to our office we have people trained to process and assist that individual to take examinations, review announcements, and so forth.

Our reorganization was designed to streamline OPM activities and make the agency a more efficient provider of its services. In no way did we harm the ability of handicapped individuals to find out about or apply for vacancies in the Federal government.

Applicants for Federal employment, including handicapped individuals, continue to seek Federal job information on competitive and non-competitive appointments through OPM's job information process. Typically, OPM provides such job information as is available on vacancies generally available in a number of agencies. Most of this information concerns general categories of jobs. There is not now and has not been a tracking system or a formal structure for obtaining or maintaining information on individual agency vacancies to be filled through excepted appointments. On an ad hoc basis, some individuals who have or had responsibility for job information, staffing and affirmative employment, (as well as those involved in administering the Federal EEO Process prior to the transfer of EEO regulatory and compliance responsibility to the EEOC) sometimes maintain contacts in agencies and may occasionally be aware of specific vacancies for which a particular applicant may be eligible. If so, they may be in a position to refer an applicant to a particular agency. In most cases, however, each agency, through its Selective Placement Coordinator, typically maintains contact with professional organizations, including State and VA vocational rehabilitation organizations, advising these organizations of vacancies for which they are recruiting, and seeking their assistance in identifying candidates, when appropriate.

The primary mechanism for excepted appointments in Federal agencies was, and continues to be, at the individual agency level. OPM's procedures related to employment of the handicapped have not changed.

In order to assure that any problems which might arise in areas affecting handicapped employment in the Federal government are addressed, my staff maintains liaison with various interagency groups, the President's Council on Employment of the Handicapped, and other organizations.

Senator EAGLETON. A question on pay equity, comparable worth, a big fight on it, right? Dr. Devine, you strongly opposed the pay equity study and insist that the administration support equal pay for equal work. Prior to the markup of the pay equity bill by the House Post Office and Civil Service Committee last May, OPM Deputy Associate Director for Staffing, Mr. James Byrnes, went so far as to send a memo to Dr. Devine suggesting that the agency use the pay equity legislation—this is Byrne with a big title writing to Devine—to "create disorder within the Democratic House, pitting union against union and both against radical feminist groups." Byrne, is he from Maryland?

Mr. DEVINE. No, sir. [Laughter.]

Senator STEVENS. He is from Missouri.

Senator EAGLETON. I hope he is not from Missouri. [Laughter.]

Mr. DEVINE. No, sir.

Senator EAGLETON. Byrnes stated to Devine that,

> The political possibilities of this situation should not be underestimated and OPM should show a clear picture to the private sector about how ridiculous the concept of comparable worth is.

That is from this guy Byrnes. Then, Dr. Devine, you scheduled a meeting with certain unions representing Federal blue-collar workers telling people that passage of the pay equity bill would result in pay cuts for pay grade employees.

The pay equity bill specifically states that no pay rates would be lowered as a result of the study. Congresswoman Oakar, a sponsor of the pay equity legislation, asked the Justice Department to investigate whether you illegally used Federal funds to lobby against the bill with union members.

At your reconfirmation staff interview, you said, when asked about a Justice Department investigation, staff was told nothing has been done because "it's a very low priority." Now first, it is a pretty simple question. Did you make that statement to the staff, both Democrat and Republican staff, in the investigation interview that they conduct prior to our hearing?

Mr. DEVINE. I don't recall precisely what I said, Senator.

Senator EAGLETON. OK, if all of them agreed—how many people conducted the interview?

Mr. DEVINE. Three, I believe.

Senator EAGLETON. If the three agree you said it, maybe you said it?

Mr. DEVINE. Seems reasonable.

Senator EAGLETON. We all say things we regret.

Now, what about this guy Byrnes, "create disorder within the Democratic House, pitting union against union and both against the Federal feminist groups."

He is one of your top advisors. What about that?

Mr. DEVINE. I characterize it as rather overexuberant.

Senator EAGLETON. Overexuberant.

If you said this thing about it being a very low priority, isn't that sort of demeaning and, in a sense, politicizing a legitimate legislative inquiry dealing with a significant national concern?

You know, I read the studies there in the paper, and I know in my own State of Missouri, not too many years ago, female assistant professors in our universities and state colleges, et cetera, in Missouri, in the same department with the same tenure with the same years of experience, would be paid less than their male counterparts.

Isn't pay equity, isn't that a pretty important issue rather than a very low priority?

Mr. **DEVINE**. I believe it is an important issue. It goes to some very fundamental questions, and we are in the process of studying that at OPM. We expect to have some results in the next month, 6 to 8 weeks, something like that. I think it is a serious subject. I think it deserves investigation. And we are doing it.

Senator **EAGLETON**. I am at my final topic, Mr. Chairman.

Senator **STEVENS**. Very good. You are doing very well.

Senator **EAGLETON**. Final topic, morale. It is 7:13 p.m. Everybody's morale is low.

Senator **STEVENS**. May I inquire if the reporter needs to have some time to make a telephone call to explain why she is late for a dinner date?

Senator **EAGLETON**. Morale, Dr. Devine, as we all know, is a very difficult thing to measure, and despite your statements that you have taken many actions to make the Federal personnel system "a more efficient and more rewarding experience," we have seen indications that the morale of Federal employees is at an all-time low.

For instance, 2 years ago, the Federal Managers' Association, a management organization composed of 15,000 mid-level Federal managers who share your objectives of greater efficiency and greater productivity, they called for your resignation. They said your policies were having a severe impact on morale and productivity among the employees that they supervise.

I can tell you, Dr. Devine, of my own knowledge of hundreds and hundreds and hundreds of Federal employees who have either called my St. Louis office or my Kansas City office or written to me; I have met with delegations of them in both Kansas City and in St. Louis and to the person, to the person, they say morale is at an all-time low.

Does this condition disturb you even a little bit?

Mr. **DEVINE**. Certainly it does. We are asking to make some major changes in the personnel system, all of which, to one degree or another, are difficult for Federal employees. They didn't create this system. But they became used to it and when we suggest basing pay on performance, rather than automatic tenure or seniority, that's disturbing to Federal employees.

When we talk about pay being high, relative to the private sector, that is something they hadn't heard before, because we have a biased survey.

When we talk about the retirement system being funded more by Governmentwide payments, which they never heard of, rather than by the 7-percent agency and the 7-percent employee contribution, we can't blame them. My own agency—I think I might have said this the other day, when I first came in—published a brochure on retirement in which we said that the system was fully funded by the 7-percent employee and agency contribution. If we are not telling them the right thing, obviously, it is difficult for them to accept it when they see the facts.

I recognize that this has been a very challenging and difficult time for Federal employees, and as I said, many times, if we can get these issues behind us, I think we can look to a much more positive era.

We recognize that there are costs of reform. Nothing is easy. I would say, however, that Federal employees have responded marvelously given this environment and not one they created. They have shown a remarkable ability to deal with change, and I am very hopeful that when we get these changes behind us—and I think we can see the end of that process coming reasonably soon—I truly expect that we'll be able to get into a different kind of environment when we have made these changes so necessary to putting our corporate house in order.

Senator EAGLETON. OK. Has the White House established a task force on Federal employee morale?

Mr. DEVINE. Not by that name, but there is a task force that dealt with that issue.

Senator EAGLETON. A task force that dealt with the issue of Federal employee morale?

Mr. DEVINE. Yes, sir.

Senator EAGLETON. Do you remember that task force?

Mr. DEVINE. Yes, sir. Well, it was a working group which I believe my deputy was on, but it reported to the full Cabinet Council. I was on the parent body, in any event.

Senator EAGLETON. But as head of OPM, shouldn't you be on such a task force or working group?

Mr. DEVINE. Well, my deputy was on it—and actually, very farseeing since she is now the Acting Director. But in any event, we wanted to set up a working group which could report to the full Cabinet Council on Management and Administration, which I serve on, and, therefore, I would serve as a second-level review of it.

Senator EAGLETON. Mr. Chairman, that completes my questioning. As I understand it, for everybody's clarification—as I understand the agreement that we struck a couple of hours ago—tomorrow morning at 9:45 in this room, we will hear from six witnesses. When that is wrapped up, that's it. There are some things to supply for the record. There was the 10-day thing and something to be in by noon tomorrow.

I ask unanimous consent that a statement from Congresswoman Schroeder about the conversation with the Denver regional director about temporary employees, 4 to 6 percent, the statement from Congresswoman Schroeder be inserted in the record at that point.[1]

Senator STEVENS. Without objection.

Senator EAGLETON. I ask unanimous consent that the questions on PACE from the hearing in the House on March 9 and 10, 1983, be put into the record at the point where I inquired about same.[2]

Senator STEVENS. Without objection.

I believe I did ask at the beginning of the hearing that there be printed in the record the letters of support received from Senators Thurmond, Laxalt, Hatch, Abdnor, Quayle, and Symms. They will all appear in the record at the same point, at the beginning of the record following the statement of Senator Eagleton.

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[1] See p. 219.

[2] See p. 180.

Senator **Eagleton**. No objection.

Senator **Stevens**. As I understand it, we have now to determine what the deadline is for the submission of the materials that have been requested other than the one item that was requested for tomorrow and that will be produced, as I understand it, at the markup tomorrow afternoon.

Senator **Eagleton**. We asked for the Brookings and Heritage money for 8 years, I remember asking that. Do you have any idea how long that would take to prepare.

Mr. **Devine**. I think it should be reasonably soon.

Senator **Stevens**. Let's just agree that any information that has been requested will be delivered to the committee by no later than the close of business on April 15. That's the first day we will be back in session. All right?

Senator **Eagleton**. Yes, that is fine with me.

Senator **Stevens**. Is that agreeable?

Senator **Eagleton**. Dr. Devine, is that agreeable?

Senator **Stevens**. Other than the one that has to be provided tomorrow afternoon.

Senator **Eagleton**. That is one day short of 2 calendar weeks.

Mr. **Devine**. I'm sure we can have it.

Senator **Eagleton**. OK.

Senator **Stevens**. We appreciate your testimony, Dr. Devine. It is my understanding that the committee will be considering the nomination tomorrow at 2:30. The balance of the hearing will commence tomorrow at 9:45. The chairman of the full committee will be the chairman at that time, and when that is completed, we will take the matter up at markup in the afternoon. We will discuss tomorrow with the committee about when we will file reports and whatnot. Has there been any other information requested?

I understand we have no further requests from anyone for time and no other questions to submit to the witness.

Thank you very much. This committee will be recessed until tomorrow morning at 9:45.

Thank you.

Mr. **Devine**. Thank you.

[Whereupon, at 7:25 p.m., the committee was recessed to reconvene at 9:45 a.m., the following day:]

RENOMINATION OF DONALD J. DEVINE

WEDNESDAY, APRIL 3, 1985

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The committee met at 9:38 a.m. in room SD-342, Dirksen Senate Office Building, the Hon. William V. Roth, Jr., chairman of the committee, presiding.

Present: Senators Roth and Eagleton.

OPENING STATEMENT OF CHAIRMAN ROTH

Chairman Roth. This is the third day of hearings on the nomination of Dr. Donald Devine to be Director of the Office of Personnel Management. Dr. Devine has served as Director of OPM for the past 4 years and was recently renominated by the President to serve another 4-year term. The importance of the position to which Dr. Devine has been nominated makes it especially important that the committee thoroughly review his performance over the last 4 years.

In the past 2 days the committee has heard testimony from a number of witnesses, including Dr. Devine. Today we will hear from a number of groups who have asked to testify. Each group has submitted a written statement which will be entered into the record in its entirety. In the interest of time, I would ask each of the witnesses to briefly summarize his statement and limit his remarks to 10 minutes.

I believe Glenn Stahl is here. Would you come forward, please. Mr. Stahl, we are delighted to have you here. For the purpose of the record, he is a member of the Board of Directors, Federal Executive and Professional Association. Senator Eagleton will be here promptly. He has a number of questions, I think, that he wants to propound, so if he isn't here at the conclusion of your statement, I would ask that you remain until he has an opportunity to ask those questions.

Mr. Stahl, would you please proceed.

TESTIMONY OF O. GLENN STAHL, MEMBER OF THE BOARD OF DIRECTORS, FEDERAL EXECUTIVE AND PROFESSIONAL ASSOCIATION

Mr. Stahl. Thank you very much, Mr. Chairman. The Federal Executive and Professional Association is pleased to present its views regarding what we consider to be the Senate's critical obligation in considering confirmation of the President's nominee for Director of the U.S. Office of Personnel Management. Because our association believes that this key office under this nominee's leadership has not been administered in the public interest, or with an appreciation of the jeopardy in which it has placed the career civil service, or the danger to Government effectiveness it has posed for future generations, we strongly urge you to recommend that an alternative nomination be required by the Senate.

Although we saw no evidence that the nominee possessed any of the requisite qualifications or disposition to administer and defend a nonpartisan merit system of Government employment when he was first appointed in 1981, we are not asking to take up your time to debate the personal behavior of this nominee. Rather we think the Senate must exercise its constitutional responsibilities in terms of whether the record shows that the laws and spirit of a high-quality civil service have been faithfully executed under this man's stewardship for the past 4 years. We find regrettably that they have not.

FEPA is committed to the public interest-oriented objective of maintaining a competent and highly motivated career service to carry out the Federal Government's manifold programs established by the people's representatives. We believe that a strong career service is every bit as vital to the welfare, security, and prosperity of our Nation as are fair elections, competent political leadership, a high-minded legislative branch, and an incorruptible judiciary. Neither this nor any other national administration can be successful in running the Federal Government as long as this ideal is flouted and jeopardized.

The Director of OPM has surrounded himself with a staff of purely political advisers, far surpassing in number and depth anything that ever existed before, has ignored the Congress and the career staff even within his own agency and has isolated himself from the broad community of interests where he should be seeking advice. He has consistently trumpeted many OPM actions and his own actions in the name of savings to the taxpayers.

Almost without exception, these actions have been proven to be false and meaningless. They have come under the heading of what I would call cost avoidance—that is, immediate out-of-pocket savings by cutting out jobs without any consideration of ultimate cost effectiveness. Let me just mention a couple of examples.

One of the handicapping so-called economy moves has been the curtailment, and in some instances, the elimination of meaningful statistical and other information regarding personnel issues so that the average citizen and even other Government agencies and interested researchers are unable to get information that they heretofore had been able to get.

Another example is the emasculation of the personnel inspection process. There is hardly any oversight any more, on the part of OPM under this man's leadership, of how well personnel management is being carried out in the individual departments.

Worse still, the last 4 years have seen an unprecedented politicization of the career service with an excessive number of partisan appointments in almost all agencies of Government but particularly in OPM itself. Now, by no stretch of the imagination can most of the political appointments in lower, middle, or senior levels be justified on grounds of policy control. And what is more, far too many of these jobs have been filled with people who have no understanding of or experience in, and I might add, sympathy for, the complex, technical functions that they purport to operate.

One columnist in another connection recently stated in the papers, "Nothing is more frightening than ignorance in action," and this condition is particularly grievous when the OPM, which is supposed to be the bastion of merit and competence in the service, openly encourages flouting the ideal and sets an extremely poor example for other agencies by politicizing technical posts.

I couldn't help but be impressed by the discussions in this committee hearing yesterday and as reported to me on Monday by the lack of sensitivity on the part of the Director to what his political actions really mean to the merit system. When he is out on his OPM business and couples with that his political campaign speeches for candidates around various parts of the country in various States, what impression is it going to leave among the average citizens out in the hinterlands about what the merit system is all about? They are going to be reaffirmed in one of the old-fashioned and outmoded popular notions that the only way to get a Government job is to get it through some kind of political partisan activity. We can't have a high-quality civil service of engineers and scientists and technicians and specialists when that is the notion, and yet that notion is certainly augmented by having a Director of the central personnel agency, of all things, be one of the main campaigners for one party rather than a campaigner for a quality of civil service.

In addition, I would like to cite three or four other points. There is the extreme decentralization to agencies of recruitment and examining, started admittedly in 1979 but exacerbated in the last 4 years, that has proceeded without even a semblance of guidance or audit to assure compliance with competitive principles and procedures.

No. 2, out of all the entrants into the service within one recent year, no more than one-fifth were hired competitively. The rest were either temporary or Schedule A or C or some other excepted appointment, with never more—and sometimes less—never more than minimum qualifications having to be met. Now, this is no way to ensure a high-quality civil service.

No. 3, replenishment of the service with competent college graduates for professional and managerial occupations has practically disappeared. After the Professional and Administrative Career Examination, known as PACE, was discontinued in 1982—and it is understandable why changes had to be made because of a consent decree by the courts on the impact of the original examination on the employment of minorities and women—no real substitute has been developed to replace it in all these 4 years.

In effect, the long standing appeal of Government programs to superior college graduates has been all but abandoned. Unless they are extraordinarily motivated for public service, college graduates become discouraged by having to shop around among countless Government agencies to seek employment instead of turning to a central source for entry. And even then, most of them can be hired only on a meeting of minimum qualifications, not by a process that encourages competition and filters out the best for actual employment. That is the situation today.

The Director of OPM maintains it has been impossible within the 4 years to develop an adequate substitute and that it is impossible to meet the requirements of the court decree.

Chairman ROTH. Mr. Stahl, we are going to try to limit each witness today to 10 minutes. So I ask you to please summarize the rest. The whole statement will be included in the record.

Mr. STAHL. I have a couple more points.

Chairman ROTH. Do it briefly, please.

Mr. STAHL. Only recently the Director of OPM has made the lame excuse for extending temporary, noncompetitive hiring authority to jobs up through GS-12 and up to 4 years in duration on the ground that this would facilitate reductions-in-force. He didn't even know when I asked him pointblank one day that there was ample authority for competitive type appointments, such as the well-conceived on-call appointments already in use in Defense and the Census Bureau, that could have been extended.

Furthermore, this action was taken without any real demand for the action or cry of need for it from the agencies and without recognizing that there were plenty of temporaries already on the rolls.

We also finally cite the abysmal disregard for the morale and productivity of civil service. When I was an official of the predecessor agency, the Civil Service Commission, I was proud to be associated with an organization that emphasized thorough selection procedures and was against any kind of mindless attacks on the competence and industriousness of civil servants. I have never seen any advertising recently of the productivity studies conducted on the period of 1967 to 1978 where it showed that in 50 Federal agencies, productivity increased an average of 1.4 percent per year at the very time when productivity in private industry was going down. I have seen no productivity studies since, and I am wondering whether there is some fear that they would not show such a favorable result.

With our association being composed primarily of professionals and scientists from all disciplines, we are especially concerned about the intake of new people into those fields and about the quality of those people and about the loss that we are now experiencing within the service of so many people in these levels.

Mr. Chairman, this is an issue that is serious enough that we think it not only merits the serious attention of this committee, but we feel that it is really taking on more than an issue of confirmation. It is taking on a question of appraisal of what has happened to this agency and this program of a high-quality civil service over the past 4 years.

Thank you very much.

Chairman ROTH. Thank you, Mr. Stahl.

As I said, if you would remain, it may be that Senator Eagleton may have some questions.

[Mr. Stahl's prepared statement follows:]

Testimony of the Federal Executive
and Professional Association
Senate Subcommittee on
Civil Service, Post Office, and General Services

Re: Renomination of Dr. Donald Devine as
Director of Office of Personnel Management

The Federal Executive and Professional Association is pleased to present its views regarding the Senate's critical obligation in considering confirmation of the President's nominee for Director of the U.S. Office of Personnel Management. Because our Association believes that this key office under this nominee's leadership has not been administered in the public interest, or with an appreciation of the jeopardy in which it has placed the career civil service, or the danger to government effectiveness it has posed for future generations, we strongly urge you to recommend that an alternative nomination be required by the Senate.

Although we saw no evidence that the nominee possessed any of the requisite qualifications or disposition to administer and defend a non-partisan merit system of government employment when he was first appointed in 1981, we are not asking to take up your time to debate the personal behavior or personal shortcomings of this nominee. Rather, we think the Senate must exercise its constitutional responsibilities in terms of whether the record shows that the laws and spirit of a high quality civil service have been faithfully executed under this man's stewardship for the past four years. We find regrettably that they have not.

FEPA is committed to what we feel is a correct and public-interest-oriented objective of maintaining a competent and highly motivated career service to carry out the federal government's manifold programs that were established by the people's representatives. We believe that a strong career service is every bit as vital to the welfare, security, and prosperity of our nation as are fair elections, competent political leadership, a high-minded legislative branch, and an incorruptible judiciary. Neither this nor any other national administration can be successful in running the federal government as long as this ideal is flouted and jeopardized.

For the last four years the top management of OPM has assumed an adversarial relationship with the Congress, with Federal workers, and with their representatives. The Agency has consistently taken actions that have challenged virtually all aspects of the civil service merit system and curtailed employee rights wherever possible. When the Director disagrees with the Congress or unions, he simply invites aggrieved employee groups to contest in the courts his agency's arbitrary interpretation of the law or other proposals. These tactics cost employee groups vast sums of money, tie up resources and capital, and make a mockery of the cooperative and concerned attitude the federal government's top Personnel Manager is supposed to display towards his workforce. Others would put it more bluntly and call it "union-busting."

Within OPM, the Director has surrounded himself with a staff of purely political advisors, ignored the Congress and the career staff, and isolated himself from the broad community of interests where he should be seeking advice. He has consistently trumpeted many OPM actions in the name of "savings to the taxpayers." Almost without exception these actions have been proven to be false or ill-advised. One of the most handicapping of these so-called economy moves has been the curtailment or elimination of meaningful statistical and other information regarding personnel issues.

Worse still, the last four years have seen an unprecedented politicization of the career federal service. We see this to be one of the most serious violations of the merit ideal: - the excessive number of partisan appointments in almost all agencies of government, particularly in OPM itself. By no stretch of the imagination can most of the political appointments in lower, middle, or senior-levels be justified on grounds of policy control; and what's more, far too many of these jobs have been filled with people who have no understanding of or experience in the complex, technical functions they purport to operate. As one columnist recently stated: "Nothing is more frightening than ignorance in action." This condition is particularly grievous when the OPM which is supposed to be the bastion of merit and competence in the service openly encourages flouting the ideal and sets an extremely poor example for other agencies by politicizing technical posts.

Additionally we cite the following:

(1) The extreme decentralization to agencies of recruitment and examining, started in 1979 but exacerbated in the past four years, has proceeded without even a semblance of guidance or audit to ensure compliance with competitive principles and procedures.

(2) Out of all the new entrants into the service within a given year no more than one-fifth were hired competitively. The rest were either temporary, or Schedule A or C or other excepted appointments, with never more than *minimum* qualification requirements having to be met. This is no way to ensure a *high quality* civil service.

(3) Replenishment of the service with competent college graduates for professional and managerial occupations has practically disappeared. After the PACE (Professional and Administrative Career Examination) was discontinued in 1982, no real substitute has been developed to replace it. In effect, the

long-time appeal of government programs to superior college graduates has been all but abandoned. Unless they are extraordinarily motivated for public service, college graduates are discouraged by having to shop around among countless government agencies to seek employment instead of turning to a central source for entry. And even then, most of them can be hired only on a meeting of minimum qualifications -- not by a process that encourages competition and filters out the best for actual employment. This is no way to recruit a blue-ribbon service for the future.

(4) Only recently the Director of OPM has made the lame excuse for extending temporary (non-competitive) hiring authority to jobs up through GS-12/ and up to four years in duration on the grounds that this would facilitate reductions in force. This ignored the fact that there had been no general request by hiring agencies for this extension and that there was an adequate number of temporaries on the rolls already. This is just another way by which the quality of the service has been adulterated. There was ample authority for competitive-type appointments (such as the well-conceived "on-call" appointments widely used for six or seven years in Defense and the Census Bureau) that could have been extended, but the current Director didn't even know the authority existed and, without getting staff advice, merely directed them to write-up the new extension of old-fashioned temporaries -- the device long known to public administration experts as the neat way, when overused, to circumvent competitive merit processes.

(5) We also cite the abysmal disregard for the morale and the productivity of civil servants. Members of our Association who were past officials of the predecessor agency to OPM (The Civil Service Commission) were proud to be associated with an enterprise that was acutely conscious of the importance of thorough-going selection procedures and of defen[illegible] public

employees against mindless and snide attacks on their competence and industriousness. Have you heard the present leadership of OPM *praise* or *defend* public employees? Have you seen it exercise the intestinal fortitude to *advise* the White House and other branches of the administration against ill-considered attacks on the civil service? Have you noticed it advertising that from 1967 to 1978 civil service productivity in 50 federal agencies increased an average of 1.4% per year at the very time when productivity in private industry was going down? Have you seen any advertising of the legally-required presidential awards for high achievement among senior career servants each year? Did OPM fight to counter the exclusion of the press from these dramatic occasions, almost as if it wanted good news about civil servants suppressed? And, by the way, have you heard of any productivity studies recently? Is there a suspicion they might show a decline?

In closing, Mr. Chairman, the FEPA would like to suggest that if nothing more, this testimony might serve as a point for alerting the Congress to a more ominous basic concern of which the subject today is a part.

Our Association is composed of professionals and scientists from all disciplines. Our membership is concerned and is aware, often from a personal involvement, of the status of a wide variety of public activities. We want to warn you that the capability of the federal career civil service has been deteriorating markedly during the past six years. The ablest veteran professionals have, and still are, leaving in record numbers. One does not have to look far to see a declining role for the United States in science, technology, manufacturing, and many other areas so critical to our national well-being in a highly charged, rapidly changing world. Our Federal mission is losing its capacity to lead.

We know that solutions to these problems cannot be solved randomly on a decentralized basis and that they must include a strong and capable federal workforce as part of the process - a workforce that derives pride and satisfaction from its efforts, be it drug enforcement or calling the hard shots on fraudulent military procurement practices and waste, a workforce that is well led by political leadership, that is proud of the Federal mission as well as the Federal worker. We do not believe this condition exists today, and we warn you it will get worse in the future unless someone acts to cut through the political balderdash that passes for conventional wisdom - and takes the necessary actions to restore dignity and respect to the career federal service.

We believe that the American civil service should return to being a "proud and lively career," just as it has been under both Republican and Democratic administrations. We don't see how it can be if this tragic administration of the central personnel agency - by all odds the worst in history - is continued for another four years. As another writer recently noted, we cannot stand by and ignore the slow destruction of a "one-hundred year resource" - the career civil service of the United States.

Chairman ROTH. In the meantime, I would like to call my good friend, Congressman Frank, and welcome him.

TESTIMONY OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Representative FRANK. Thank you, Senator. It is nice to be before you, and I appreciate you accommodating me this way. You have been very diligent at this hearing.

My name is Barney Frank. I am a representative of the Fourth District of Massachusetts in the House. I have been for 2 years and 3 months now the Chair of the subcommittee of the House Government Operations Committee, your House counterpart, which has jurisdiction over among other things the Office of Personnel Management. And based on the very extensive experience I have had in that time period with Mr. Devine and his operation, I am here reluctantly to testify against his confirmation. Reluctantly because I think the President ought to have a broad scope in his power of appointment and because I think Mr. Devine is a man of some significant ability.

But his judgment seems to be seriously flawed, particularly for this position.

He is a man who is by nature an advocate, a controversialist. He is a man who enjoys challenge, who enjoys fighting with people. I don't think that is the quality people want to have in a personnel director. I do not think in the private sector a man who prides himself as much as Mr. Devine evidently does on his ability to be controversial, on his ability to infuriate people—and we know he takes pride in that—I don't think in general that is the sort of personnel director we ought to have.

No one expects the personnel director to be loved by the people he or she directs. Neither is it healthy for a man to be in charge of the personnel system who enjoys humiliating people for the sake of the argument.

There is one specific issue I want to talk about, one that I didn't feel free to talk about until after the House Government Operations Committee approved our report. The House Government Operations Committee approved the report yesterday. It cannot be released because we are awaiting minority views.

The three Republican members of my subcommittee joined in the substantive report. They differed with us about some of the language. They felt we had been rather harsh. But they agreed with the bottom line which was that last September when several Governors engaged in State voter registration activity, Mr. Devine—we used the words that were suggested by our minority in an amendment adopted by the subcommittee—improperly interfered in the election process which was a misuse of the Intergovernmental Personnel Act. I stress again, the Republican members of the Subcommittee on Employment and Housing of Government Operations—I don't speak for them—I do point out they joined in a unanimous subcommittee vote on condemning the action of the Office of Personnel Management as an abuse of the Intergovernmental Personnel Act for partisan purposes. There is a terrible danger of the misuse of this vast Federal personnel system for anything partisan.

We have legislated against it, excessively in my judgment. I am a great fan of the Hatch Act, but to have Mr. Devine in September of a Presidential election year use the Intergovernmental Personnel Act in a manner which Republicans and Democrats on the relevant subcommittee agreed was an improper interference with the electoral process is one of the main reasons I am here today.

What Mr. Devine did was to send letters based, he said, on an editorial of the Wall Street Journal. This is in the hearing record which I will be glad to make available. He sent public letters to the Governors saying your funds may be cut off if you are violating the Intergovernmental Personnel Act, and we have reason to believe—the newspaper said threatened cutoff and that is clearly what it was meant to be. This is a section of the Intergovernmental Personnel Act Mr. Devine never previously paid attention to and will almost certainly not pay attention to in the future. He sent letters to three Governors of the opposite party because they were engaged in voter registration activity. He characterized them as potential abusers of the law and threatened them.

We had a hearing. We asked him to produce a shred of evidence they had done anything improper. He was unable to. That was in September. We had the hearing in October. As of today, we have continued to ask and have not received from the Office of Personnel Management—I made the statement yesterday in a Government Operations hearing—we have not received from Mr. Devine or his staff a single documentation of a single abuse in any of the three States.

This is my staff director I asked to accompany me. Mr. Weisberg.

Mr. Devine has been asked; he hasn't produced a shred of evidence. We asked him if he had ever written any similar letters to other States threatening them for violation of the Intergovernmental Personnel Act. The answer was no. He took no followup action in this regard.

Having made this public threat, he did literally nothing even to investigate, leaving this cloud hanging over the Governors, until he understood that our subcommittee was deliberating. He then sent people out.

So we have just in summary the following situation: Last September, Mr. Devine, in a very public way, unfairly and inaccurately characterized the actions of three Governors who encouraged voter registration as a potential violation of the Intergovernmental Personnel Act based on no evidence and no allegation of complaints he has ever been able to show us.

He threatened them with cutoff of their funds in an effort to disrupt voter registration. As a matter of fact, this body on the initiative of your colleague from Arizona, Senator DeConcini, put into the continuing resolution last year a phrase specifically to repudiate Mr. Devine's actions which said voter registration and State help is not a violation of the Intergovernmental Personnel Act. You have your own unanimously adopted resolution which the House concurred with saying what Mr. Devine did was wrong. We investigated, and what we have concluded—and I want to add, the Republicans did not write what we characterize Mr. Devine's motives to be and they thought we were rude to Mr. Devine, and I would agree that we were. [Laughter.]

But our original title—my staff director gets the credit—we proposed the title, "Devine Intervention: OPM's Efforts to Chill Nonpartisan State Voter Registration Activities." That was stricken by an amendment we adopted which was the minority suggestion and here is what the minority of my subcommittee, the Republicans, said we should call this, "OPM's Questioning of Nonpartisan State Voter Registration Activities Constitutes a Misuse of the Intergovernmental Personnel Act."

It was unanimously adopted by the subcommittee. This is language submitted by the minority. "The State voter registration programs in Texas, Ohio, and New York which were called into question by OPM Director Devine do not appear to violate the IPA. OPM's September 24 letter to the Governors of those States implying that their voter registration drives might be in violation of the IPA, constituted a selected application and misuse of the IPA." This is a conscious and deliberate effort to manipulate the Intergovernmental Personnel Act for partisan purposes 1½ months before the election.

Mr. Devine is a dedicated and able controversialist, a forceful advocate of a particular political position, but he lacks, in my judgment, the temperament and judiciousness we ought to have in the director of a personnel system.

When we voted on this report yesterday, one of the Republican members said he didn't like the voter registration in Ohio, so he was going to vote against the report. But the Ranking Minority Member of the subcommittee indicated he intended to vote for the report. He said we were a little too harsh on Mr. Devine personally, but agreed that OPM, at Mr. Devine's particular and specific direction, improperly interfered with the election process.

To compound it, I think in October he said the reason he did it was that Geraldine Ferraro made him do it. It turned out in 1982, some 2½ years before this event she had written a letter objecting to his proposal to weaken some of the guidelines in this act dealing with affirmative action and hiring of women and minorities. I think, again, the impulse to invoke a perfectly reasonable letter she wrote as a member for an entirely unrelated purpose a couple of weeks before the election is why I don't think he is fit to be the Director of our Federal Government's personnel agency. I appreciate the chance to speak before you today, Mr. Chairman.

Chairman ROTH. Thank you for coming over here.

Senator Eagleton?

Senator EAGLETON. I have just one or two questions, Mr. Chairman. Thank you.

Congressman Frank, refresh my memory. In this voter registration letter-writing business, there were two letters sent out by Director Devine. One to three Governors on September—I think it is the 28th?

Representative FRANK. Twenty-fourth.

Senator EAGLETON. Twenty-fourth. And then a second letter to 47 Governors on—do you know the date of that?

Representative FRANK. October 1.

Senator EAGLETON. You are a practicing politician, as Chairman Roth and I are as well. Isn't it a curious thing—before asking that, the text, temper and tone of the October 1 letter, the one that went to 47 Governors, including some Republican Governors, obviously, is somewhat different than the text, temper and tone of the September 24 letter that went to three Democratic Governors. Is that not correct?

Representative **FRANK**. Absolutely, Senator.

Senator **EAGLETON**. I think we ought to put both letters in the record.[1]

Representative **FRANK**. First of all it is very clear to me from the sequence, the second letter was sent because there was controversy over the first letter. Why send three and then a week later send the others? By the way, by the time he sent the October 1 letter, voter registration in many States was about to end. It was close to the election. In other words, the first letter to the three Democratic Governors came when there was a critical week of voter registration still available. Everybody else—by the time they got it with a 30-day cutoff—there wasn't much time.

Senator **EAGLETON**. Including my home state of Missouri which had a Republican Governor.

Representative **FRANK**. As we all know, that week was voter registration drives; that week is when you probably do a very significant percentage of your voter registration. In the second paragraph of the letter to the three Democratic Governors——

Senator **EAGLETON** [interposing]. September 24.

Representative **FRANK**. "It has come to our attention that your State is using its employees to ask individuals if they are registered to vote. Apparently, if they reply they have not, they are asked why they are not registered."

That, by the way, the three Governors said was not true and Mr. Devine produced no allegations to the contrary, so he was wrong. We asked them what that was based on—an editorial in the Wall Street Journal.

You should be advised we will cut off your funds, in effect, and you must reply by October 1. They had a week to reply. The others, the letter of October 1, said they had to October 15 to reply and there is no allegation. In fact, in the letter it says, "There is nothing wrong, per se, in State conduct of voter registration." That is not in the first letter. Absolutely one is a threat and one is a covering of one's posterior.

Senator **EAGLETON**. Final question: Is it not a political fact that the three Democratic Governors and States that were targeted—New York, a letter to Cuomo; Texas, a letter to White; Ohio, a letter to Celeste—were three of the most hotly contested races in the Reagan-Mondale race?

Representative **FRANK**. It certainly was a race at that time, Senator. We all hoped they were. [Laughter.]

Senator **EAGLETON**. On November 3 they didn't prove to be.

Representative **FRANK**. That was our view.

Senator **EAGLETON**. On September 24, we viewed that to be the case.

Representative **FRANK**. That is exactly right. That is clearly the case. Nothing has been brought forward to substantiate any of those allegations. In fact OPM is clear, they were interested only in sending those letters and chilling voter registration. We are familiar with investigative reports and investigative efforts. They did nothing but send that letter trying to scare them.

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[1] See pp. 190 and 191.

Chairman **Roth**. Thank you, Congressman Frank. It is always a pleasure to see you.

Senator **Eagleton**. Mr. Chairman, I ask unanimous consent—yesterday I put in the record, with Senator Stevens' approval, a statement of fact as we deem the facts to be on this letter-writing business. Senator Stevens said to put it in the record in the interest of time. I would like to attach to that by unanimous consent a chronology date by date that would be attached to that statement that was put in the record yesterday.[1]

Chairman **Roth**. So ordered.

Mr. Stahl, there are no questions for you. Mr. Shaw, would you come forward. Mr. Shaw is the general counsel for the Senior Executives Association. Again, I would request that each witness limit to 10 minutes his statement. The full statement will be included in the record.

TESTIMONY OF G. JERRY SHAW, GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION

Mr. **Shaw**. Thank you, Mr. Chairman, I will certainly do that.

Mr. Chairman, it is a pleasure for me to be here to represent the views of the Senior Executives Association. The Association represents the 6,000 career executives who are career members of the Senior Executive Service.

The association takes no position on Dr. Devine's personal qualifications or fitness for the directorship. Rather, we would like to talk about our concerns on the type of leadership and direction which we believe OPM requires at this time.

In our statement, which you have so kindly admitted into the record, we point out nine areas under OPM's jurisdiction which we think need specific attention in the next 4 years. First, employee training and development. Mr. Chairman, as you know, Government employees are being asked to do more with less. There are many technological improvements being made today. Some real efforts at providing guidance and leadership by OPM to agencies to design and implement training for employees to be able to operate in this new environment need to be made.

The SES training and development for future executives, the executive development programs, have not been well developed by OPM. The leadership has not been there and in many agencies, executive development programs are now nonexistent. A recent report issued in March of this year by the Merit Systems Protection Board pointed out over 40 percent of the Grade 15 members of the Federal work force say that they would not go into the Senior Executive Service. Part of the reason for that, we believe, is because of the failure of the executive development programs.

The OPM has also not promoted the SES upward mobility program even though it is required by the Civil Service Reform Act.

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[1] See p. 191.

Research and demonstration projects need to be worked on to deal with, for example, the new merit pay system and other programs enacted by Congress.

We have often talked about the vagaries of the current classification system. We believe a major study needs to be done there. One of the things that is most difficult today, Mr. Chairman, is to find out the work force makeup and what we are doing to promote new people entering the work force and what kinds of people we are going to need in the future.

About the Federal Personnel Manual system, the National Academy of Public Administration stated: "The Federal Personnel Manual has 8,814 pages. If regulations generated good personnel management, the Federal Government would have the best personnel system in the world. In fact, the personnel system doesn't seem to work very well for anybody."

The PACE examination, which the courts found invalid, needs to be modified and revised.

Finally, Mr. Chairman, we have an overall concern. I can go back to my days as a boy in Montana. I always believed somewhere, someplace, someone up there was looking out for the system. We don't believe today that there is someone in charge of the system who has an overall plan for personnel management of the Federal Government.

We are often concerned about how the Government of Nicaragua operates or that of El Salvador, or other countries. The association thinks that we have to be very concerned about how our Government operates now and in the future. We think OPM should take a leadership role in looking at what the compensation program and the overall personnel management program should be now and in the future, so we can maintain the strength of our country and the strength of our Government.

Thank you, Mr. Chairman.

Chairman ROTH. Thank you, Mr. Shaw. I appreciate your brevity.

Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Shaw. Your full statement will be made a part of the record. We very much appreciate your appearance.

[Mr. Shaw's prepared statement follows:]

PREPARED STATEMENT OF G. JERRY SHAW

I appreciate the opportunity to appear before the committee to present the views of the Senior Executives Association (SEA) on the nomination of Donald Devine to be director of the Office of Personnel Management (OPM). SEA takes no position on Dr. Devine's personal qualifications or fitness for the directorship. Rather, our concerns center on the type of leadership and direction which we believe OPM requires at this time.

SEA believes that the position of OPM director is of prime importance for several reasons. The personnel program of the Federal Government is critical to achieve the objectives of the Administration and to carry out the legislative mandates of Congress. Federal employees today are being challenged to improve government services, to respond to new technology, to carry out new policy directives, and in many cases, to increase productivity in the face of shrinking resources.

At the same time, major changes are being proposed in the retirement system, a system which federal employees have relied on as a condition of government service and which has, for many, partially offset their concerns about inadequate pay compensation. Cuts, however, have also been proposed in their pay, and changes in the system of personal leave are under consideration, as well as in the health insurance program. Seldom has the federal workforce more badly needed a central personnel office which can provide support and leadership.

The changes which have created uncertainty, and sometimes trauma, among employees necessitate that OPM take the lead in facing up to these management problems in a positive and constructive way. The director has an obligation to the workforce, to the personnel system and to the human relations environment of the government. The manner in which federal personnel matters are handled impacts directly on the ability of the federal government to perform effectively.

I would like to describe some of the human resources needs of the Federal Government, and I ask the committee to determine the nominee's position on these needs.

OPM has a range of responsibilities defined in statute. Its director must recognize and meet all such statutory responsibilities and is not free to choose among them. OPM responsibilities which SEA believes are in dire need of attention include employee training and development, research, the classification system, performance evaluation, the Federal Personnl Manual, delegations of personnel management authority, and the PACE examination.

Employee Training and Development

At a time when we have underway major management initiatives such as automation, regulatory reform and expansion of contracting out, OPM has had virtually no impact on policy and action for training, whether employee development, employee re-training, or other vehicles for adapting to change. While we recognize that such training and development is, indeed, a responsibility of the agencies, OPM must provide assistance and exert its government-wide role to influence meeting these needs. OPM must:

- evaluate government-wide needs for training and employee development,
- establish a strong policy and leadership posture in support of such education and training needs,
- develop new programs and courses which would help to meet such needs,
- protect budget funds for training and education by offering sound advice and information to the White House and Congress which would help to explain and justify the need for such funds.

SES Training and Development

In a similar vein, OPM must articulate an overall policy for senior executive development, and evaluate agency efforts, to ensure that agencies are providing the kind of executive development programs defined in the Civil Service Reform Act (CSRA). This is not now being done. OPM has also not promoted SES mobility programs, despite the clear intent of the CSRA to encourage and facilitate such mobility.

Research and Demonstration Programs

OPM must develop a personnel management research program. The Federal Government continues to lurch into major changes in its personnel system, for example, performance evaluation and merit pay, with only the vaguest idea of what works and what doesn't. OPM simply needs to do its homework.

Without such a program, OPM and Congress will continue to issue orders to agencies without fully understanding their consequences.

The Classification System

The classification system is an absolutely essential tool for the development and maintenance of a sound, *acceptable* personnel sytem. It is now in disarray, amd is almost universally distrusted throughout government.

Current classification actions are seriously open to question regarding accuracy and reliability. Part of the current debate over appropriate numbers of grades 13, 14, and 15 positions is caused or exacerbated by the faulty classification system. This system cannot be relied upon to support responsible debate on personnel policy issues. What is clearly needed, and has been needed for some time, is a major new study and redesign of the classification system.

Merit Pay/Performance Evaluation

While OPM led the Federal Government into major new systems changes affecting the lives and income of many thousands of employees, it, in fact, had a limited notion of what the consequences would be. Any further extrapolation of the merit pay system must be based on realistic research and evaluation of various types of pay motivation systems to determine what really works and to what degree it, in fact, affects motivation and productivity.

Workforce Data and Analysis

OPM must begin to develop and provide sound, reliable, unbiased data about the federal workforce. Just as we have good, statistically sound data from the Bureau of Labor Statistics (BLS) on the national workforce, we should have a comparable program of reliable federal workforce data to aid and support the public policy debate affecting that workforce, including its total pay and benefits compensation package. Just as Congress reviews and approves the contents of such data sources as the BLS survey and official economic statistics, so too it should review and approve an OPM program of data collection and analysis for the same reason: to assure its accuracy and reliability and to avoid any distortion or misuse.

Delegations of Personnel Management Authority

At a time when agencies have been very much under the gun to deal with administrative and program changes and have needed all of the help they could get, OPM has been centralizing personnel authority in itself. This hurts agencies, which often need to act quickly to accomodate RIFs or transfers stemming from program cuts, to block grant delegations to states, or to deal with rare opportunities to hire from the outside. What is badly needed is a reversal of the OPM policy of centralization of personnel power, and, in its place, a deliberate policy of granting agencies the latitude to manage their own personnel matters, especially for recruitment, selection and classification.

The Federal Personnel Manual

The nature of this need could not be better defined than to quote from the report on personnel management issued by the National Academy of Public Administration (NAPA): "The Federal Personnel Manual (FPM) has eight thousand eight hundred and fourteen pages. If regulations generated good personnel management, the Federal Government would have the best personnel system in the world. -- In fact, the personnel system doesn't seem to work very well for anybody." Such a manual is not fit for use outside of personnel organizations, and, perhaps not inside them. It is not understood and it is not trusted. It is seen as an unwarranted administrative control system which constrains supervisors rather than helps them. Even professional personnel managers agree that they spend too much of their professional time "feeding the manual" and too little on the more interesting and productive elements of the profession. The NAPA study cited above makes a whole series of recommendations about how the FPM can be carved back down to realistic size, including the development by OPM of a useable, special handbook for managers and supervisors.

The Professional and Clerical Examination (PACE)

It is now more than five years since a court restraining order caused the OPM to withdraw the PACE examination as the principal vehicle by which the Federal Government tested and listed thousands of candidates for entry level professional federal jobs. No effective action has been taken to replace this exam with a new vehicle which satisfies the court's concern. Even in its "cutback" environment, the government hires new employees, especially in defense and law enforcement. And the government still needs a good method to bring in bright, able people from university graduating classes and from private industry. Young people who want to start public careers are hampered. Either OPM must develop a new instrument - quickly - or delegate to all agencies, the authority to develop their own systems which satisfy the court requirement.

In conclusion, I would like to emphasize that the SEA looks forward to addressing constructive solutions to these problems with the next director of OPM. Our concern centers solely on OPM's interest in addressing these problems and their willingness to seek and implement constructive solutions to them under the nominee's leadership. We would ask no more, and no less, of _any_ nominee to this critical position at this critical time. The effective, efficient operation of the Federal Government depends on it, for our workforce is our most important resource.

Chairman ROTH. Mr. Tobias, the president of the National Treasury Employees Union, will be next.

Mr. Tobias, your full statement also will be included in the record. Please proceed.

TESTIMONY OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you, Senator Roth. Good morning.

I appreciate very much the opportunity to testify at these hearings concerning whether or not it is appropriate for Mr. Devine to serve in the capacity of the Director of the Office of Personnel Management, and we strongly urge he not be allowed to serve in this capacity and he not be confirmed by the Senate.

We believe that this set of hearings and this set of evaluations by the Senate is different than the original confirmation hearings where the Senate would be taking the recommendation of the President. Here the Senate has reserved to itself the obligation of reviewing Mr. Devine's record after a period of 4 years, and we think that after this period of 4 years his record is abysmal.

We think that under the Civil Service Reform Act one of the obligations of the Director of OPM is to serve and give advice to the President of the United States and we think the advice that has been given is directly contrary to the kind of advice that the President should have received.

For example, we often hear from Mr. Devine and this administration that the Government should somehow be run like a business. Certainly no chief executive officer of any corporation would constantly be going around the country saying that the people who work for him or her are all overpaid and underworked. We certainly know that is not true, we resent it, and we certainly don't think a manager whose job it is to motivate employees would behave in that fashion.

We think another example of bad advice is the approach Mr. Devine has expressed that the way to cut costs is to increase turnover in the Federal Government. We are aware of several private sector corporations who spend thousands and thousands of dollars to increase employee loyalty. Well, what Mr. Devine seems to think is that the way to cut costs is to force people out of Government and hire new employees. Now, at the time he issued his so-called study and press releases, and so forth, there certainly had been no analysis done as to what cost there would be in employee loyalty. There have been no analyses done in how overhead costs would increase through the need to train people. No analysis was done of how much cost there would be to even bring people on board. So I think Mr. Devine's advice in this area is wrong as well.

We think that Mr. Devine's stewardship as the Director of OPM has not been good either. For example, when he directly went against the Congress of the United States and implemented his regulations and then lost in the District Court and appealed to the D.C. Court of Appeals, the court said: "All things considered, we find OPM's position untenable." In other words, the court was saying that this wasn't even a close case. "We find OPM's position untenable."

And in another case in which we were involved as a union, Mr. Devine made a policy to start appealing arbitration awards, decisions by arbitrators, as a regular matter. Finally the Federal circuit described one appeal by OPM as whimsical—whimsical. Here we have someone in charge of OPM, processing the appeals that the courts described as whimsical and awarded significant attorneys' fees as a result.

We also think his stewardship has been not very good on just the day-to-day matters of processing disability claims and processing retirements. As I travel around the country, it is not unusual to receive complaints from people who go 4, 5, 6 months without receiving their first retirement check. This is just fundamental day-to-day management of the Office of Personnel Management, and certainly you know better than I Mr. Devine's relations with the Congress of the United States.

Mr. Devine is not a person who thrives on cooperation or compromise. He is a person who thrives on confrontation. I think that for the director of OPM and the person who is certainly responsible for leading and directing 2.3 million employees, a confrontational approach is not the approach that is needed today. We certainly recognize that, as Federal employees, we have to be efficient and we have to do a good job. Certainly someone constantly telling us we do a bad job doesn't motivate us to do a good job.

And finally, I think part of Mr. Devine's responsibility is to deal with the unions that represent employees, and I think here Mr. Devine has also ignored the responsibility, he has ignored the representatives of employees and pursued a course of action which I believe is very, very detrimental to Federal employees and ultimately detrimental to the taxpaying public.

Senator, that summarizes my statement, but in short, in summary, we strongly urge that this committee vote not to confirm Mr. Devine as the Director of the Office of Personnel Management.

Chairman ROTH. Senator Eagleton.

Senator EAGLETON. Thank you very much, Mr. Chairman.

I congratulate you, Mr. Tobias, on a very thoughtful and analytical presentation. I have no questions.

Chairman ROTH. Thank you, Mr. Tobias.

Mr. TOBIAS. Thank you.

[Mr. Tobias' prepared statement follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS

Mr. Chairman and members of the Committee, I want to thank you for the opportunity to appear before you today to discuss the nomination of Dr. Devine to continue his tenure as Director of the Office of Personnel Management. In my capacity as President of the National Treasury Employees Union, the exclusive representative of 120,000 Federal employees and retirees, both I and my staff have had numerous dealings with Dr. Devine and OPM over the past four years. In almost every instance, we have found Dr. Devine to be confrontational, unwilling to negotiate, and unfeeling for the concerns of Federal employees.

As the members of this Committee consider whether or not to recommend Dr. Devine for confirmation for a second term in this position, I believe the key question to be answered is whether or not Dr. Devine has exhibited the management and leadership capabilities necessary to continue as the government's chief personnel officer. An objective look at Dr. Devine's overall leadership and his management of OPM in particular require one to answer a resounding "NO!"

Throughout his stewardship of the government's personnel, Dr. Devine has repeated one theme to the American people about Federal employees and retirees. Federal employees are overpaid, underworked, and receive overly generous retirement benefits. How do such false statements further the government's overall purpose of providing for the security, health and safety of the American people? I ask the members of this committee, what would happen to the quantity and quality of work and the morale of the members of your staffs if you spent your time on television, radio and in the press telling the American people your employees were lazy, overpaid and only interested in fat retirement checks. How long do you think quality work would continue to be performed?

I would just like to discuss several examples of Dr. Devine's leadership at OPM. The first deals with the proposed regulations concerning performance appraisals and reduction-in-force determinations which Dr. Devine issued in March, July and October of 1983. I won't rehash the blow-by-blow scenario of this case, because I'm sure we are all familiar with it. Suffice it to say, that each time Dr. Devine issued these regulations, the Congress moved swiftly and decisively to ban their implementation. During consideration of the Fiscal Year 1984 continuing resolution, the Congress voted to ban implementation of these regulations throughout Fiscal Year 1984. The President then signed the continuing resolution into law. Congress, its work being finished, left town. Dr. Devine then announced that Congress really had not banned the regulations and they would be implemented in four days. NTEU immediately went to District Court and was granted a temporary restraining order barring OPM from implementing the proposed regulations. A month later the Court granted a permanent injunction barring the implementation of these regulations for the remainder of the fiscal year. Even after this, Dr. Devine appealed the court's ruling and lost once again. Three times, Dr. Devine wasted the time and money of the taxpayers pursuing his own private agenda which Congress had previously banned through legislation.

Another area where OPM under Dr. Devine has clearly demonstrated its confrontational approach towards Federal employees is in arbitration awards. Arbitration awards are the result of a negotiated agreement between Federal unions and government agencies. By the terms of these agreements, and pursuant to the Civil Service Reform Act, an arbitrator's decision is binding upon the parties. Despite the fact that the parties have negotiated binding arbitration procedures, OPM consistently challenges arbitration awards in which an arbitrator mitigates a removal imposed by an agency. The Federal Circuit's authority to review arbitration decisions is limited to cases in which the arbitrator committed an error of law which will have a substantial impact upon the Civil Service as a whole. Despite the clear statutory requirement that OPM seek review of arbitral awards only where they have substantial impact and involve errors of law, Dr. Devine chooses to challenge awards involving mitigation in inappropriate situations. In fact, the Federal Circuit has called his arguments "whimsical" and has generally found that they had no basis in law or in established civil service principles. Devine v. Sutermeister, 724 F. 2d 1558, 1563 (Fed. Cir. 1983).

His position derives no support from any of the principles which were designed to guide the federal government and are contrary to the fundamental concepts which Congress established to protect Federal employees from unjustified action and to prevent unnecessary and repetitious litigation. This flagrant disregard for the basic precepts of Federal employee rights has been expensive. Where OPM pursues unfounded appeals of arbitral awards, the government, and consequently, the taxpayers, pay for Devine's actions through awards of attorney fees and litigation costs. Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984). In a time when budgetary considerations are a major topic, and Dr. Devine himself is recommending that Federal employees bear the brunt of budgetary cutbacks, it is ironic and wholly inconsistent that Dr. Devine himself is causing the federal government to incur unnecessary expense through the advancement of legal positions which the courts call "without merit", "radical departure[s] from the procedural safeguards provided for in the CSRA" and "precisely the type of issue which OPM should not petition for review." Sutermeister, supra, at 1563, 1564-1566. In the course of his attempts to deny Federal employees the rights to which they are unquestionably entitled, Dr. Devine has ignored prior caselaw which totally controlled subsequent appeals and has shown a total disregard for the collective bargaining agreements which form the basis for informal dispute resolution. Devine v. NTEU and Duff, No. 83-1409 (Fed. Dir.) (Slip op. issued July 2, 1984); Sutermeister, supra.

It is antithetical to the interests of the federal system as a whole to permit the Director of the Office of Personnel Management to pursue his own beliefs and interests while shielding himself with the power inherent in his official position. His actions in the area or arbitration demonstrate that Dr. Devine does not have the regard for the judicial system, the respect for collective bargaining, or the desire to promote an effective and efficient federal labor system which are necessary for the Director of the Office of Personnel Management.

I would finally like to discuss several specific problems which we as a union have had in dealing with OPM. Many members of Congress have also expressed their frustrations to me in these areas.

First of all, we have received numerous complaints from our retired members who experience problems obtaining forms concerning Federal Income Tax deductions from OPM. It either takes months to receive the forms after a request or they just don't receive them at all.

Another area of concern is the amount of time which OPM takes to approve the granting of special pay rates to particular classes of employees. As I'm sure all of the members of the committee are aware, the government is experiencing an ever increasing difficulty in attracting and retaining specially qualified employees. OPM has been taking approximately 2 1/2 years to approve such special pay requests.

We have also experienced lengthy delays in the processing of medical disability payments, widows' survivor benefits and generally any tasks that take personnel rather than machines to perform.

Dr. Devine seems to pride himself on his management skills at OPM. He has slashed OPM's staffing and agrees with all those who recommend such proposals for other government agencies. But I can assure you that just as OPM fails to provide adequate service to the public as a result of Dr. Devine's mismanagement, so too will other agencies be placed in the position of cutting costs by cutting service to the public.

I want to thank you for allowing me to appear before you today and I'm ready to answer any questions you may have.

Chairman ROTH. Our next witness will be Vincent R. Sombrotto, who is president of the National Association of Letter Carriers.

Mr. GOULD. I am George Gould, legislative director of the National Association of Letter Carriers. Mr. Sombrotto, president of NALC, because of a travel conflict, cannot be here this morning but he asked that his statement in opposition to Mr. Devine's confirmation be entered into the record. Also, as chairman of the FAIR coalition of 28 Federal and postal unions and organizations, he asked that their statement in opposition to Mr. Devine's confirmation be entered in the record.[1]

Chairman ROTH. Without objection.

Our next witness will be James Peirce, the president of the National Federation of Federal Employees. Welcome, Mr. Peirce. Your full statement will be included. Would you please summarize.

TESTIMONY OF JAMES M. PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. PEIRCE. Thank you very much and I will do just that.

Mr. Chairman, committee members, I appreciate this opportunity to appear before you today to present the National Federation of Federal Employees' views on the pending reconfirmation of Dr. Donald Devine as Director of the Office of Personnel Management. During the last 4 years as Director of OPM, Dr. Devine has delighted himself in being the self-proclaimed nemesis of the civil service. He has failed to communicate with employee representatives such as NFFE, but he has been open to the media in his attacks on Federal pay and the retirement system. He has also proposed drastic cuts to these benefits in harebrained schemes that Congress fortunately has ignored.

His mismanagement of the Federal Employees Health Benefit Program has resulted in illegal benefit reductions, premium increases and delayed open seasons. He has also tried, on more than one occasion, to illegally implement regulation changes. Finally, he has politicized his office and set a terrible example for Federal employees who are prohibited from partisan political activity.

Under Donald Devine's management, employee morale is at an all-time low and worker productivity has been seriously compromised. These reasons alone are sufficient enough for us to call upon the committee to reject Dr. Devine's nomination. Perhaps one of the most discouraging attacks Federal employees have had to face over the last 4 years has been Dr. Devine's siege mentality. Since taking office in 1981, the former OPM Director has set about a smear campaign designed to represent Federal pay, benefits, and retirement as an unwarranted burden on American taxpayers.

Faced with such persistent attacks from their personnel director, Federal employees have lost all confidence in their job situation. And employee morale is at an all-time low, despite the results of Dr. Devine's employee attitude survey. If Dr. Devine is so confident in his contention that employee morale has not suffered under his tenure, I would like to know why the delegates to NFFE's 37th biennial convention, representing 150,000 Federal employees, overwhelmingly approved a resolution last September calling for Donald Devine's resignation.

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[1] See p. 481 for Mr. Sombrotto's statement and p. 479 for the FAIR statement.

I believe that the record speaks for itself. Each one of these examples points to a man who has spent 4 years trying to drive highly qualified employees out of the Federal work force and trying to penalize those who stay. Under Dr. Devine's direction, employee morale has plunged, labor-management relations have been frozen, employee protections attacked and several programs almost destroyed. Would you want Dr. Devine managing your own staff and offices in the same manner?

To put it another way, if I owned a company and I wanted to ensure that it would fail in a year, I would hire Don Devine as its chief executive officer. I hope the committee will take a thorough look at Dr. Devine's record and consider what could happen to the Federal work force and public service if his nomination is approved. In the best interest of this country and the civil service, I urge you to oppose his confirmation. That concludes my summary, Mr. Chairman. I thank you very much.

Chairman ROTH. Thank you, Mr. Peirce.

Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Peirce. We appreciate your presentation.

[Mr. Peirce's prepared statement follows:]

PREPARED STATEMENT OF JAMES M. PEIRCE

Mr. Chairman and Subcommittee Members: I appreciate this opportunity to appear before you today to present The National Federation of Federal Employees' views on the pending reconfirmation of Dr. Donald Devine as Director of the Office of Personnel Management. During the last four years as Director of OPM, Dr. Devine has delighted himself in being the self-proclaimed nemesis of the Civil Service. He has failed to communicate with employee representatives such as NFFE, but he has been open to the media in his attacks on Federal pay and the retirement system. He has also proposed drastic cuts to these benefits in hare-brained schemes that Congress fortunately has ignored. His mismanagement of the Federal Employees Health Benefit Program (FEHBP) has resulted in illegal benefit reductions, premium increases and delayed open seasons. He has also tried, on more than one occasion, to illegally implement regulation changes. Finally, he has politicized his office and set a terrible example for Federal employees who are prohibited from partisan political activity.

Under Donald Devine's management, employee morale is at an all-time low and worker productivity has been seriously compromised. These reasons alone are sufficient enough for us to call upon the Committee to reject Dr. Devine's nomination.

Perhaps one of the most discouraging attacks Federal employees have had to face over the last four years has been Dr. Devine's siege mentality. Since taking office in 1981, the former OPM director has set about a smear campaign designed to represent Federal pay, benefits and retirement as an unwaranted burden on

American taxpayers. Dr. Devine's personal appearances, radio announcements and press releases have all been aimed at inciting hysteria over Federal employees' hard-earned benefits. He has even employed bogus statistics or has misrepresented information to make his case. When a recent study released by the reputable Hay/Huggins Company indicated that total compensation in the Federal sector is 7.2% below that of private industry, Dr. Devine cooked up his own statistics to show that Federal employees are overcompensated. He developed a study using outdated or misrepresented Bureau of Labor Statistics information to indicate that low Federal "quit rates" mean employees are paid too much. Needless to say, the Bureau of Labor Statistics disassociated itself from the study and rejected the findings as questionable at best.

Faced with such persistent attacks from their personnel director, Federal employees have lost all confidence in their job situation. And employee morale is at an all-time low, despite the results of Dr. Devine's employee attitude survey. If Dr. Devine is so confident in his contention that employee morale has not suffered under his tenure, I would like to know why the delegates at NFFE's 37th biennial convention, representing 150,000 Federal employees, overwhelmingly approved a resolution last September calling for Donald Devine's resignation. I cannot think of any manager in the private sector who would interpret this sentiment as a positive indication that his employees were happy with their work environment!

If abuse of employees is not cause enough to reject Dr. Devine's nomination, I ask you to look at his record of mismanagement of the FEHB program. In 1981, NFFE negotiated our 1982 health insurance program with OPM. After we had concluded our negotiations, OPM came back to us and told us to cut benefits and increase premiums or be dropped from the program. We complied to OPM's satisfaction. Several months later, OPM again ordered us to cut benefits an additional 6.5% at which point we protested and filed suit. The case was decided in our favor after the court found that OPM's actions were "arbitrary, capricious and an abuse of discretion" - in fact, a fairly good description of Dr. Devine's dealing with us at every level. Subsequently, the entire FEHB program was thrown into turmoil; open season was delayed and employees were left in the dark about their health care. If Dr. Devine had managed a private health insurance program in the same manner, it probably would have gone bankrupt.

Nor has Dr. Devine's mismanagement of the Combined Federal Campaign gone unnoticed. He has tried repeatedly to limit access by non-traditional charities, such as NAACP Legal Defense and Education Fund, to the charity drive apparently because of his own personal politics. In addition, his agency's attempts at reviewing proposed campaign literature for accuracy were found unacceptable by the General Accounting Office. Dr. Devine's management of the program, in fact, caused the chairman of the House Government Operations Committee, Representative Jack Brooks, to comment that the CFC was "in grave danger of becoming history".

NFFE is particularly concerned, however, with Dr. Devine's efforts to dismantle employee protections, and his willingness to go beyond the law to do it. In 1982 Dr. Devine changed regulations to require employees furloughed as a condition of their employment to pay the employer and employee costs of health insurance. This act alone (which we challenged successfully in court) was insensitive and inequitable. But the manner in which the former director attempted the change, by illegally eliminating the required notice and comment period, was especially disruptive. Once again, the courts ruled that OPM had failed to act within the bounds of the law.

Perhaps a more familiar example of Dr. Devine's combative management approach to labor relations has been his ongoing attempt to enforce his pay-for-performance regulation changes. Despite a congressional ban on implementing his regulation changes in fiscal year 1983, Dr. Devine ordered agencies to comply with his proposals. NFFE and several other Federal employee unions immediately filed suit against this action and the court ruled in our favor, finding that the regulations were "null and void". Nevertheless, Dr. Devine continued to thwart the congressional and court prohibition by permitting the publication of the regulation changes in the January 1984 Code of Federal Regulations. Once again we were forced to seek an injunction against the former director. Is this any way to manage a workforce - through illegal fiat?

Finally, as personnel director of the largest workforce in the world, Dr. Devine should have been responsible for setting an examplary standard of conduct for his employees. However, his partisan political activities and abuse of perquisites have called into question the Director's integrity. His flagrant abuse of Government vehicles and chauffeurs to attend political and religious events and his active campaigning on behalf of openly anti-Federal employee candidates have lost him the respect of many of his subordinates. In light of the Hatch Act restrictions on Federal employees, Dr. Devine's politicization of his office is especially insulting.

I believe that the record speaks for itself. Each one of these examples points to a man who has spent four years trying to drive highly qualified employees out of the Federal workforce and trying to penalize those who stay. Under Dr. Devine's direction, employee morale has plunged, labor-management relations have been frozen, employee protections attacked and several programs almost destroyed. Would you want Dr. Devine managing your own staff and offices in the same manner?

I hope the Committee will take a thorough look at Dr. Devine's record and consider what could happen to the Federal workforce and public service if his nomination is approved. In the best interest of the Civil Service, I urge you to oppose his confirmation.

That concludes my statement. I will be happy to answer any questions.

Chairman Roth. Our final witness will be Kenneth T. Blaylock, who is president of the American Federation of Government Employees. Welcome, Mr. Blaylock. Your full statement will be included in the record.

TESTIMONY OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

Mr. Blaylock. Thank you very much, Mr. Chairman.

We did submit a statement to the committee Monday, and I am sure the committee and your staff have had time to read it. I would first like to compliment the committee on the thoroughness of your process in this confirmation. It is a midterm confirmation and in very few positions in Government the Government has required midterm confirmations. And to speak in behalf of the Federal workers, as other speakers before me have, I would like to point out some issues and refresh your memory a little bit.

When the Civil Service Reform Act was passed, there was serious concern, in fact by members of this committee, as to whether or not the person occupying this position should be allowed to participate in partisan politics. There was concern that the career system could be politicized because we were changing from a bipartisan commission to a single director. As I recall, it was, I think, Senator Mathias and I believe Senator Chiles raised the issue at that time.

Well, if, in fact, this was not going to be a bipartisan controlled body any more in charge of the largest personnel system in the world, and if, in fact, the person was going to be allowed to be free to pursue political objectives, then the Congress should have a responsiblity to take a midterm look.

Let me just in summary point out a few of the things we think are important for the committee to look at.

On page 7 of my statement I guess is our basic position.

As a union representing Federal workers, we expect to have differences with any administration, we expect to have differences with the Congress from time to time over personnel policies and practices. But, Mr. Chairman, in my 30 years in Government and my 20-some years representing Federal workers, we have always expected, and been dealt with in an honest way, with people who had honest concerns and beliefs and dealt with integrity.

We do not expect the issues we deal with—which may be pay, may be conditions of work, may be retirement—we do not expect a campaign of distortions and outright lies being used to shore up political positions. Now, if you are going to evaluate the Director of the Office of Personnel Management—and he is a big one on merit performance and performance evaluation—and you look at one of the statutory obligations of that office, it is to develop—or secure I think is the word that is used in the act—accuracy. And we are assuming that that meant to provide accurate data to the Congress, to the American people, on which decisions could be made in adjusting the personnel system.

Well, I would say to you that his distortions on the proposed quit rate, his distortions on the numbers dealing with the Federal retirement system when he says it cost every citizen in this country, and I forget the exact number, but it was well over $2,000-something dollars, as I recall, and if you calculate that out, every Federal worker would be retired with over $40,000 in retirement and you and I know that is not a fact. You look at the quit rate proposal which he could not explain to the House of Representatives recently and he used figures from a 1969 survey that was done in the Postal Service, but he gives that to the Congress and the public as though it is a current fact, and the list could go on and on. Congressman Frank referenced the man's personality and his attitude and that of liking confrontation and pursuing his means to the end no matter what.

Currently, we have 160-something cases in the Federal courts. We have over 260 appeals before the Merit Systems Protection Board. There has been a tremendous increase in the amount of litigation that we are involved in.

Used to be when we got an arbitrator decision, he abided by it. Today it is automatically appealed. In our testimony, we reference cases that have cost the Government over $110 million in back pay. One of them is over $4 million in back pay, and legal fees where we claimed the legal fees and we got them. The cases are pursued to the limit end and even then he refuses to accept a decision of the arbitrator, decision of the Merit Systems Protection Board, decision of the courts. When Congress postponed—it was the Hoyer amendment regarding the merit pay system and Congress postponed that—he refused to accept it. He went and had it published in the Federal Register with very fine print and disclaimer. We went to the courts. The courts ordered him to remove it and finally replace it with another notice, at tremendous cost to the taxpayer.

In the labor relations area, it takes us 16½ months to negotiate a contract today. The scope of arguing has been narrowed to the point we have argued over parking places and break time. There has been confusion, instructions given by OPM to all the Federal agencies in the area of labor relations narrowing the scope of bargaining. It has caused tremendous confusion with the managers of Government. Used to be when we saw a problem within labor relations, we resolved those problems. As a result of Mr. Devine's interference—and if you read the act, Congress gives OPM no authority in the labor relations area. Those authorities were given to the Federal Labor Relations Authority to define the scope of bargaining, et cetera, et cetera.

So in summary, Mr. Chairman, if the Senate gives Mr. Devine a performance evaluation here at midterm based on the criteria laid down in the law and responsibility of that office, if you use the same criteria Mr. Devine proposes to use in evaluating all Federal workers, you are going to find that his performance has been unsatisfactory.

And we obviously urge you to impose the findings of this hearing, and if you go over the facts, we are sure that you will not confirm this man to continue destroying a Federal career personnel system.

Thank you very much, Mr. Chairman, and I will be glad to try to answer any questions that you may have.

Chairman ROTH. Thank you very much, Mr. Blaylock.

Senator Eagleton?

Senator **Eagleton**. I have no questions for Mr. Blaylock. I thank him, as I thank all of the six witnesses who testified before us this morning.

Chairman **Roth**. Yes, I want to express my appreciation for your being here, too.

Mr. **Blaylock**. Thank you very much.

[Mr. Blaylock's prepared statement, with attachments, follows:]

PREPARED STATEMENT OF KENNETH T. BLAYLOCK

My name is Kenneth T. Blaylock. I am the National President of the American Federation of Government Employees which represents 700,000 Federal employees nationwide.

The American Federation of Government Employees is pleased to have this opportunity to testify at the confirmation hearing on the reappointment of Donald Devine to be Director of the Office of Personnel Management.

We are here to recommend that the Committee reject Donald Devine's nomination as Director of the Office of Personnel Management. For the past four years, Mr. Devine has been entrusted by the President and Congress with the stewardship of the federal personnel system. He has not been worthy of that trust. Under his stewardship the long standing principles of a career merit personnel system have been contravened, by:

-the increased use of political appointees;

-the substitution of temporaries for career workers;

-a continued ideological attack of distortions and misstatements on federal employee compensation;

-a disregard for the role of unions in the federal sector;and

-a blatant politicization of his office.

Since Mr. Devine took office, the nation's best and brightest no longer look to a civil service career as a desirable option. Since Mr. Devine took office, the morale of the existing workforce has plummeted with obvious impact on productivity and the quality of government services.

In our testimony, we will show that Donald Devine has misused his office for demagogery and propaganda thereby poisoning the debate and dialogue over civil service issues. We will show that Mr. Devine has demeaned the integrity of his office by using his position for political ends. We will show that Mr. Devine has not met the legal responsibilities of his office. We will show that Mr. Devine has continually flaunted the law, court decisions, Merit System Protection Board rulings, and Congressional action in pursuit of his ideological goals.

Poisoning of the Dialogue

On retirement, we recognize that we have disagreements with the Administration over fair and appropriate retirement benefits. We fully expect to engage in vigorous debate with the Administration over these differences. What we do not expect is lies and intentional distortions of the issues.

In the March 4 OPM press release he accuses the House Post Office and Civil Service Committee of "fiddling while the CSRS burns billions of tax dollars." He claims that the unfunded liability causes a "severe financial crisis that demands decisive action." He cites a $30 billion 1982 cost for CSRS and cites an unnamed study that each taxpayer pays $250 per year for Federal retirement.

Let's take each of these claims in turn.

First, the unfunded liability is not a cost to government.

It is merely a calculation used by pension experts. Technically, it refers to the difference between projected future assests and liabilities. As P. Royal Shipp, senior specialist in social legislation of the Congress Research Service said, the unfunded liability "is not really a cost issue, although it is often portrayed as one." Edwin Hustead, the ex-chief actuary of CSRS, reiterated in testimony, "Unfunded liability has nothing to do with the solvency of the current system. It can not be equated with present or future debt." Since both the Treasury and the CS Retirement Trust Fund are in the unified budget, the Treasury could eliminate the unfunded liability tomorrow without increasing the budget deficit by one dollar. Instead, Mr. Devine uses this calculation to spread fear and panic.

Second, the outlays for the CSRS were 19.7 billion, not 30 billion dollars. Even Representative Dannemeyer's office (Republican-California) (not known as a friend of CSR) was moved to note: "The 31.4 billion figure was incorrect because it described income to the retirement trust fund rather than outlays which were 19.7 billion." (See Response to "Ten Myths" Prepared by Office of Representative William Dannemeyer, December 31, 1984).

Finally, there were over 141 million taxpayers in 1981---at $250 per taxpayer the average annuity for retirees would have been almost double ($19,290) the government cost per retiree in 1982 ($10,770)

Devine's March 9 press release continues with the same type of cheap sensationalism. His primary claim is that the CSRS costs the government more than programs for the nation's "truly needy." Once again he overstates by 12 billion the cost of CSRS. Second, he excludes many programs like Medicad and Supplemental Security Income which are targetted for the nation's poor. But the more important question is why is this particular comparision being made?

CSRS is part of a compensation system for Federal employees. It represents deferred compensation which Federal employees have earned. Low income programs represent a social consensus in this country over our social responsibility toward those who are less fortunate. What does a deferred compensation program have to do with social policy programs?

The press releases are not an attempt to establish a position through facts and argumentation. They are an attempt to demagogue, distort, and misrepresent a crucial issue in his domain. They are indicative of the approach he brings to all Civil Service issues.

Another prime example of this approach is the OPM report entitled: "Reforming Federal Pay." Although the report purports to put forth a novel approach to setting Federal pay based on quit rates, it can be more clearly read as a justification of the Administration's proposal to cut pay by 5%. The argument boils down to: "Since quit rates in the Federal sector are lower than in the private sector, Federal employees are over paid and their pay should be cut." We are attaching a full critique of this approach, but what needs to be addressed here is his method for making this argument through "cooked" numbers, absurd "apples and oranges" comparisions, and outright misrepresentations.

The Devine report insists that Federal quit rates "are much lower than those in the private sector." A chart compares a Federal quit rate of 3.8% to a BLS manufacturing quit rate of 18.2%, a BNA non-manufacturing quit rate of 18%, and a Postal Service quit rate of 13.4%.

In fact, the quoted Postal Service quit rate is from 1969, a time of low unemployment and buoyant business conditions, much different from the 1981-1983 recession. According to OPM's own source, Postal quit rates had dropped to 6.7% by 1972 and to 4.4% by 1976. Since 1972, they have consistently been much lower than quit rates for other Federal employees. (See Douglas K. Adie, An Evaluation of Postal Service Wage Rates, 1977.)

The BNA figure quoted as a quit rate for private non-manufacturing is actually a "separation" rate that includes retirements, discharges, and other involuntary separations. It is not a "voluntary quit rate" as OPM claims. (See "Instructions for BNA Quarterly Survey", Bureau of National Affairs.)

The BLS manufacturing quit rate used by OPM is that of durable goods manufactured in 1981: firms with an average of only 60 employees, cyclical employment patterns, low skills levels and low turnover costs. A more comparable figure is that of the telephone communication industry, with an annual quit rate of 3.6% to 4.8%.

In fact, OPM's previously published reports give 1981 and 1983 quit rates for Federal employees of 7.99 and 7.03%, respectively. (See Federal Civilian Workforce Statistics, Monthly Release, Office of Personnel Management, December 1981 and December 1983.) Since these figures do not agree with those in Reforming Federal Pay, some groups must have been excluded. While both Post Office and BLS figures include blue-collar, part-time and temporary employees, we suspect that OPM's figures for Federal employees do not.

His second assertion is that Federal quit rates are lower than those in the private sector "for just one reason: overall, compensation is too high." But firm size, business conditions, occupational mix and pension plans are all reasons why the Federal quit rate cited would differ from the other quit rates.

A recent economic study of the same data, concludes that "much of the difference between quit rates in the government and the private sector can be accounted for by the larger size of the government." (See Kathleen Utgoff, "Compensation Levels On Quit Rates in the Public Sector," Journal of Human Resources, Summer 1983.) With an unbiased model, pay is not the crucial factor.

Finally, he concludes that Federal pay should be "frozen or actually reduced until...quit rates become similar to those in the private sector."

As an aside, we would note that our civil service is based on non-political hiring of the most qualified applicants and then building continuity by maintaining a long term career workforce. Mr. Devine appears ready to jetison that principle by actively pursuing policies to increase turnover rates. As far as I am aware this is not a standard management pratice!

What we are trying to establish here is that our opposition to the reaffirmation of Donald Devine is not only over the differences we have with him on the merits of these various issues, but rather the means he used in striving for his ends. A democracy is dependent upon public debate and accurate information. A democracy is misserved when people in high positions misuse their power to obfuscate debate and propagate misinformation.

The Integrity of the Office

In a similar vein, it is our belief that the Director of OPM should be a person of integrity, authority, and respect. His or her office is responsible for managing the largest workforce in our country. The office is abused when Mr. Devine uses his position as a partisan campaign post.

The office was abused when he sent letters to the Governors of Ohio, Texas, and New York threatening to cut off Federal funds because of voter registration drives in these states. The office was further demeaned when he cited a two year old letter by Representative Ferraro opposing "spoils" systems in states as the rationale for his actions (see attached.)

The agency is being abused when taxpayer money is used to print the OPM magazine (see attached) which takes cheap political shots at the Democratic Mayor of Chicago, Harold Washington, and Democratic Party activist/actress Jane Fonda.

The agency is demeaned when Mr. Devine uses the power and official labor relations channels of its office to deliberately mislead and divide the unions and others in an effort to thwart legislation dealing with the question of pay equity. We are attaching a memorandum prepared by James Byrnes, Deputy Associate Director for staffing at OPM to Donald Devine outlining this very approach. We are also attaching the statement of George Hobt outlining the attempted implementation of that strategy.

Here we quote briefly from Byrne's memorandum to indicate the extreme politicization of the OPM.

> The political possibilities of this situation should not be underestimated. By doing job evaluations across clerical and blue collar occupations, a comparaable worth study would immediately divide the white collar and blue collar unions...Moreover, the unions would be pitted against the radical feminist groups and would further divide this constituency of the left....We could create disorder within the Democratic House pitting unions against union and both against radical feminist groups.

The politicization of the agency became transparently clear in the case of George Nesterczuk. Nesterczuk, Associate Director for Administration at OPM, resigned to be campaign manager for Lawrence Hogan's Senate race in Maryland in the summer of 1982. Nesterczuk returned to OPM in his old job less than one week after the election. Under the Hatch Act, an agency cannot agree to hold open a job for an official who leaves to work in a political campaign. Mr. Devine calmly explains: "There is nothing illegal or wrong about that, as long as no agreements are made beforehand." (See Washington Post, November 22, 1982.) Such an explanation carries gullibility to a new level.

The very person who is responsible for issuing regulations and for providing guidance to Agencies and employees on activities which might violate the Hatch Act allowed one of his key, top aides to skirt the law through an insincere, inappropriate, and possibly unlawful resignation and rehire ploy.

Mr. Devine's Performance As Director of OPM

Perhaps the demagoguery and manipulation of the office for political ends could be overlooked if Mr. Devine was "fully successful" in complying with the functions of his office as specified in the CSRA of 1978. Included in the functions vested in the Director of the Office of Personnel Management by the CSRA are:

- Securing accuracy, uniformity, and justice in functions of the office

* Executing, administering and enforcing:
  - The Civil Service rules and regulations of the President and the Office and the laws governing the Civil Service and
  - The other activities of the office including retirement and classification activities.
* To promote an efficient Civil Service and a systematic application of the merit system principles.

We maintain that if these functions are defined as critical elements in the Director's job and if reasonable performance standards were applied for these functions, an objective performance evaluation would result in Mr. Devine's termination.

We will document this abdication of responsibility in three major areas--pay, labor management relations and legal obligations.

Pay

In 1981, Mr. Devine promulgated a 94% rule for comparability to justify its initial 4.8% pay raise for FY 1982. Both GAO and CBO found no justification for this standard. (See CBO, "Adjustments in Federal White Collar Pay, A Technical Review of Past Proposals," March 22, 1983.)

We are attaching a February 17, 1983 letter by the major federal employee unions on the relationship between Mr. Devine and the Federal Employee Pay Council. The letter adequately summarizes the futility we experienced in attempting to fulfill our obligations under the law.

We question whether an "efficient Civil Service" is promoted by his denial of pay increases for most special rate employees even though (in GAO's words) "there are substantial pay disparities between private sector and federal salaries." We are attaching pages 12-14 of the GAO report "Federal White Collar Special Rate Program", March 30, 1984, which details the Agency objections to Devine's action and lists the implications of those actions on agency operations.

We further question how the morale, productivity, and efficiency in government is forwarded when Devine's office constantly attacks, through word and deed, the pay system; and is continually proposing various schemes to cut Federal employee now and in the future.

We have previously cited his misdeeds in the areas of pay equity and the use of quit rates.

The above list is representative of his failure to fulfill his obligations to see that Federal employees are properly paid and their rights protected. They also show his lack of concern for employees and his abject failure of his obligations to deal in good faith with their representatives.

Labor Management Relations

Mr. Devine's remarks in two recent speeches before the Society of Federal Labor Relations Professionals on March 14, 1983, and the Industrial Relations Research Association on January 28, 1983, clearly reflect his attempt to undermine collective bargaining and effective labor relations as mandated by Congress in the Civil Service Reform Act.

He stated before both groups that the collective bargaining system was inconsistent with appellate procedures under the MSPB which are "rule driven" and governed by merit principles. Therefore, contrary to the Federal Labor Relations Authority and court decisions, he announced that he had instructed agencies not to permit employee grievances in performance based actions. To further present his case against collective bargaining, he cited increased costs under the CSRA for negotiations over topics which he viewed as "insubstantial." Implying to the audience of federal managers, union representatives, and neutrals that collective bargaining was a waste of money, he asked the audience, "Has it [collective bargaining] been worth it? It's an important question that needs attention." The speech led one stunned member of the audience to question, "Dr. Devine, Congress found collective bargaining to be in the public interest. I take it by your remarks that you disagree with Congress?"

Specifically, actions taken by Mr. Devine since his appointment as Director of OPM illustrate his efforts to undermine collective bargaining and labor-management relations under the Statute. In this political and philosophical disagreement with Congress, Mr. Devine chooses to ignore the law and will of Congress to achieve his ideological ends.

On March 30, 1983, and slightly modified on July 13, 1983, Mr. Devine published in the Federal Register, under the guise of guidance, a laundry list of topics which he stated were non-negotiable. He did so even where in many instances the guidance was inconsistent with FLRA or court decisions thus creating enormous disruption and confusion between front line managers and unions.

For instance, in the area of impact and implementation bargaining, Mr. Devine took an extremely restrictive approach which is contrary to the FLRA's "acting at all" standard and recent interpretations of this part of the Statute by the D.C. Circuit Court of Appeals.

He went so far as to list several bargaining topics which the FLRA has held negotiable but which OPM said should not be negotiated by agencies because he disagreed with the FLRA and the FLRA decisions were currently in litigation. Examples were: day care centers, crediting plans, limiting use of part-time employees and limitations on how agencies reach contracting-out decisions.

With respect to permissive bargaining, Devine's regulations stated that agencies should not elect to negotiate unless benefits "far outweigh limitations on management flexibility." Such policy is contrary to the Statute and a major impositon on the discretion granted to agencies in the permissive bargaining area.

He also listed another fifteen topics which he stated were appropriate only for "consultation" not negotiation. Again, such subjects have been found by the FLRA to be mandatory subjects for bargaining.

On January 4, 1985, Mr. Devine issued more regulations whereby he attempted to eliminate the right of employees to grieve within-grade increases, RIF's, and pay rentention under negotiated grievance procedures.

The above regulations promulgated by Mr. Devine far exceed OPM's authority under the Statute. While OPM was given authority over a broad scope of federal personnel polcies and practices, the Statute gave OPM no responsibility or authority in the area of labor relations. Specifically, it has no authority to determine the negotiability of proposals, or the proper scope of collective bargaining under the Statute.

Arbitration decisions which are supposed to be final and binding are now being challenged, not only by agencies acting with OPM guidance, but by OPM filing of amicus briefs. Congress expressly included the use of arbitration in the CSRA to provide timely decisions and avoid long term litigation. By requiring unions to share in the cost, frivilous charges would be avoided and cost minimized. Devine's actions are making a mockery of this Congressional intent.

The chilling effect that the regulations have had on collective bargaining is immeaurable in terms of hostile labor-management relations and added cost to the government as a result of extended negotiations and increased litigation. Provisions which have been in collective bargaining agreements for years are now being declared nonnegotiable. Where the renegotiation of agreements took a relatively short time, under OPM guidance, such negotiations have become bogged down in negotiability appeals, unfair labor practice charges, etc.

Instead of resolving problems through collective bargaining, he is creating problems through the collective bargaining process.

Instead of building good and productive labor/management relations he is out to destroy the framework of labor/management relations. Instead of using labor/management relations to increase productivity and save money, his attack on collective bargaining prolongs negotiations, increases litigation and costs money. Therefore, instead of taking a closer look at the collective bargaining system, as Mr. Devine suggests, Congress should take a closer look at Mr. Devine.

Agency Missions and Legal Obligations

Mr. Devine's actions in the legal arena are a prime example of his inability to accept any decision which goes against his political/philosophical point of view.

Even when actions to remove personnel are taken erroneously and in contravention of the law, Devine refuses to accept that decision. For instance, 15 employees of the Farmers Home Administration and nine employees of the Agricultural Stabilization and Conservation Service, U.S.D.A., who occupied Schedule A positions were RIFFED in 1981--supposedly because the Agencies had reorganized. An Administrative Law Judge ruled there was no valid reorganization and hence, the RIF was improper and the employees should be reinstated with back pay and benefits. The MSPB upheld this decision yet Devine still believes the RIF actions are correct as is evidenced by his filing of an appeal in this case in the U.S. Court of Appeal for the Federal Circuit. The costs of such frivolous actions are enormous. In this case, the back pay and accrued benefits total approximately $1.4 million and the pending attorney's fee petitions are in excess of $110,000. Is Devine's continued defense of a twice found illegal action justified particularly when viewed in terms of overall cost?

Devine's use of frivolous appeals has frequently been the source of chiding by the Courts and the basis for significant attorney's fee awards for those who must defend when Devine follows every avenue of appeal when even an absolute novice knows an appeal is fruitless.

If Devine performed satisfactorily we maintain there would be little significant litigation and a substantial cost savings to the Government but certainly, if he recognized the validity of arbitrators, FLRA, MSPB and court decisions, there would be an even greater savings to the government. Is anyone here aware of how many times Mr. Devine has been in court since January 1, 1981? I have here a print out of all the cases in which OPM/ Devine was a party. Some 160 cases as well as some 260 cases heard by the MSPB. If the total cost of prosecuting or defending each one of these cases was only $2,000 then these Devine cases cost the government $840,000, enough money to pay 15 Grade 15 employees for one year. How can this profuse litigation be defended by Mr. Devine?

Pay is another legal area in which Mr. Devine's performance is far from satisfactory. Certainly Senator Stevens is aware of the case brought by certain Alaskan Federal employees who challenged Devine's arbitrary reduction in the cost of living adjustment to the salaries of those stationed in Alaska which is considered a high cost of living area. The Court agreed with the employees and once again, Devine was chided by a Court for his failure to adhere to the precepts of established law.

Let's move to another area of Mr. Devine's responsibility--that of the Federal Employees Health and Benefit Program. Here is another area where Devine has failed to administer the law but rather attempted unilaterally to change the law. Remember in 1981-1982 when Devine decided to dictate what benefits would be offered under the various Federal Employee Health Benefit plans and for what premium costs? Representatives of employees immediately challenged Devine who once again was told by a Court to administer the law not to change it. OPM was to approve ~~plans~~ which offered that wide choice and which provided certain basic provisions. The function of OPM was to approve plans and not to design them or to dictate what benefits would be included. Once again, Devine failed in the performance of a function of his job.

Mr. Devine has had an overriding concern with his own criteria for performance evaluations. In the fall of 1983, he published in the Federal Register sweeping changes affecting the integrity of the non-partisan entitlements to promotions and merit pay; changes that would disrupt seniority protections in reduction in force situations, and changes to the applicability of the Fair Labor Standards Act to Federal employees. These wholesale revisions to the statutory protections against political meddling with career opportunities of Fedeal employees were of such overriding concern to Congress that it passed the Hoyer Amendment to the Continuing Appropriations Act of 1982 prohibiting the expenditure of monies to implement the regulations.

Despite the Congressional mandate, he sought to impose the regulations, prompting AFGE and other federal unions to go into federal court to force OPM to comply with the mandate. NTEU and AFGE v. Devine, 733 F.2d 114 (D.C. Cir. 1984), aff'g 577 F.Supp. 738 (D.D.C. 1983). In resolving the issue, the court held that OPM's "suggestions that the congressional resolution is not applicable to the regulations as finally issued is singularly unpersuasive." The court continued by stating that OPM's position was "belied by the plain terms of the resolution." With regard to the legislative history, the court states:

> In the words of the Distrcit Court, "[the] inescapeable conclusion is that in the Hoyer Amendment, Congress must have been concerned with the set of final regulations."

The court of appeals also rejected Devine's claim that the Hoyer Amendment, if applicable at all, still enabled other federal agencies (without any OPM involvement) to self-administer and enforce the regulations. The court found his position untenable, one which would lead to absurd results and constitute an abdication by OPM of its "central responsibility for executing, administering, and enforcing civil service rules and regulations."

AFGE filed for attorney fees, claiming that there was no basis to OPM's position. OPM agreed to pay AFGE's legal expenses, resolving AFGE's claim.

If its actions were not blatant enough already, OPM, despite the district court action prohibiting implementation of the regulations, insisted that the "new regulations" be published in the Code of Federal Regulations with only a fine print disclaimer that the regulations were "currently in litigation." That edition of the Code of Federal Regulations was sent to personnel offices throughout the country for their use. How was a personnel officer in Colorado Springs to know that the regulations were invalid? OPM was ordered by the district court to correct this unlawul action, by deleting from future printings of the CFR and to furnish each subscriber with notice that the regulations were not valid (at taxpayer expense.) The court characterized OPM's actions "as a gross misstatement" as to the effect of the "new regulations." See NFFE v. Devine, 591 F. Supp. 166 (D.D.C. 1984).

Conclusion

Last week in testimony before the House Post Office and Civil Service Committee, Republican Representative Daniel J. Evans stated:

> ....[One] of the very specific requests we made of GAO was to include in their report an analysis of OPM's alleged internal pay equity review. I was not pleased to learn from GAO, before the completion of its report, of OPM's unwillingness to make this information available. Senator Cranston and I followed-up after the GAO report was submitted to Congress with a formal request for this information from Dr. Devine. To date, we have not received a

> response to our inquiry. I make this point because I wish the record to make it clear that this type of conduct and behavior is unacceptable."

As Rep. Evans so aptly put it, what is evident about Mr. Devine's performance, is that it is--"unacceptable."

Every Federal worker is subjected to an annual performance evaluation. Congress in passing the CSRA insisted that they, in effect, be given the authority to give the Director of OPM a "performance evaluation" once every four years. It is our understanding that this provision was explicitly inserted as a check on the politization of that office in its succession to the bi-partisan Civil Service Commission. Congress clearly recognized the importance of a professionally operated OPM and a professionally managed workforce in the provision of good government services. Congress has responsibility for conducting Donald Devine's performance evaluation.

Has Mr. Devine had a satisfactory rating in any of the key functions he is required by law to perform? No he has failed.

Has he secured accuracy, uniformity, and justice in the functions of his office? No. He has failed.

Has he executed, administered and enforced the civil service rules and regulations? No. He has failed.

Has he promoted an efficient civil service and a systematic application of the merit system principles? No. He has failed.

Has he accepted the CSRA provisions on collective bargaining? No. He has not.

Has he handled the duties of his office in a professional manner? No. He has not.

Has he maintained a non-partisan, apolitical approach to the office? No. He has not.

In the name of good government, long standing personnel principles and professional management, we ask this Committee to honestly and accurately evaluate Mr. Devine's record. We are confident that such an evaluation will reveal his performance to be -- unsatisfactory--.

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NEW

ATTACHMENT
[illegible]

For immediate release
March 4, 1983

Mark Tapscott

HOUSE COMMITTEE "FIDDLES" AS GOVERNMENT'S PENSION PROGRAM "BURNS," DEVINE SAYS

(WASHINGTON, D.C.)---Members of the House Post Office and Civil Service Committee are "fiddling while the Civil Service Retirement System (CSRS) burns billions of tax dollars," Donald J. Devine, Director of the Office of Personnel Management (OPM), said today.

"With an unfunded liability of half a trillion dollars, more than $100 billion of which was accumulated in the last two years alone, CSRS faces a severe financial crisis that demands decisive action," Devine said. "Fiddling while the system burns billions can only postpone the day of reckoning and impose even greater burdens on the American taxpayers."

Devine's comments came in response to the committee's decision to ignore Reagan Administration reform proposals for the CSRS. The system cost nearly $30 billion in 1982 for benefits paid to more than 1.9 million federal retirees and survivors. The average CSRS pension is $12,480 per year, compared with approximately $4,800 for a typical Social Security System retirement benefit.

"Unlike Social Security, CSRS has access to general revenues from the U.S. Treasury," Devine noted. "Employee contributions and their matching agency contributions account for only 28 per cent of the system's annual income. The taxpayers, through direct and indirect transfers from the Treasury, pay for the rest of the system's revenues. According to one study, that costs every taxpayer approximately $250 each year to support a government pension program that is far more generous than either Social Security or typical private sector pensions.

"Compared with Social Security, CSRS spending is skyrocketing. Between 1960 and 1981, CSRS spending increased 1,891 per cent, while Social Security spending went up 1,209 per cent. In the same period, employee contributions to CSRS increased only 437 per cent, while taxpayer contributions exploded by 2,351 per cent.

"The CSRS program is now the federal government's fourth largest entitlement program and, unless the President's reforms are soon adopted, there is doubt that the majority of American taxpayers will continue to support a pension program so much more generous and expensive than those most Americans have in the private sector. This would be a tragedy for all federal employees," Devine concluded.

ATTACHMENT [illegible]

AFGE RESPONSE TO THE OPM REPORT REFORMING FEDERAL PAY

The OPM report, Reforming Federal Pay, advocates using voluntary quit rates as a method for establishing federal pay. Given the quality of the report, this proposal can not be taken seriously.

I. The Quit Rate Theory:

The idea that quit rates can be used to determine appropriate pay is drawn from the economic model of" perfect competition." In the "perfect competition" model, there are many firms producing the same services and competing for the same employees. All employees are exactly alike, geographic location are exactly alike, all firms and employees have perfect knowledge of wages and economic conditions, there are no hiring or training costs, and no unemployment.

If and only if all these assumptions were true could quit rates be used as indicators of temporary differences in pay.

In fact, all employees are not exactly alike. Perfect knowledge does not exist. The business cycle continues to operate. Geographical conditions do matter. Employees do suffer economic costs when workers quit -- replacements must be found, interviewed and trained until their productivity reaches the level of older employees. While the theory OPM relies on suggests that firms are indifferent to quitting behavior, firms in the real world try very hard to keep their best employees from quitting.

As most economists recognize, the economic model of pure competition, although useful as a heuristic device, is not applicable to most labor markets. [1] More applicable is a career job market where employers pay more than the absolute minimum necessary to attract workers, and implicitly promise not to cut wages in the future. In return, employees implicitly agree not to quit, thus keeping their valuable skills and knowledge within the firm that trained them.

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[1] See, for example, Robert W. Hartman, Pay and Pensions for Federal Workers, The Bookings Institution, 1983 for an application of this point to the Federal Government in particular.

In practice, one firm in a particular industry may well have unusually low quit rates because of personnel management practices that promote both productivity and morale. If the OPM theory is used by that firm it would force such a firm to cut its wages in order to raise its quit rates to the industry average. This would destroy the productive labor-management relations which caused the improved productivity and the low quit rates in the first place. Any establishment applying the OPM theory would destroy the incentives to managers to improve morale and output because such efforts would immediately be contradicted by reductions in relative wages.

On a strictly technical level, it is impotant to note that proxy variables are only used to measure a variable which can not be quantified. [2]OPM's proposal to use quit rates as a proxy variable for pay makes no sense when pay can be measured directly (which is what the annual PATC survey accomplishes).

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[2] OPM's source for the quit rate proposal, for instance, explained it this way: "There is no decisive evidence from comparisons with pay rates in other jobs, private or federal, that postal workers are underpaid or over paid. (Therefore) ... we must turn to the evidence of voluntary quit rates." (Douglas Adie, An Evaluation of Postal Service, Wage Rates, American Enterprise Institute, 1977)

II. Problems with Implementation:

Even if the quit rate theory was correct (which it is not) it would be impossible to implement for the Fedeal Government.

The fact is that many other factors besides pay influence quit rates. These include:

- Firm site - Because larger firms offer more possiblities for advancement and intra-firm transfers, quit rates are lower in larger firms than in smaller ones. Thus as the largest employer in the country, the Federal Government would be expected to have lower quit rates. This is especially important in comparisions between the Federal Government and private manufacturing firms, which have on average only 60 employees. One recent study concludes, in fact, that most of the difference between federal and private quite rates is due to firm size, not pay. [3]Any quit rate theory to be made operational for the Federal government would need to be statistically adjusted for the size of the Federal Government

- Occupational mix - Highly skilled employees with high education levels quit less often than employees in unskilled occupations. Employees in predominantly white-collar sectors like the Federal Government have lower quit rates than blue collar sectors like manfacturing. Any quit rate to be applied to the Federal Government would need to adjust for the occupational mix in the federal sector.

- Geographical location. Employers in the South and West have lower quit rates than those in the Northeast and Midwest. [4]This is related to relative unemployment rates and the availability of alternate employment opportunities. Any quit rate model to be applied to the Federal Government would need to adjust for the geopraphic location of each federal job.

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[3] Kathleen Classen Utgoff, "Compensation Levels on Quit Rates in the Public Sector," Journal of Human Resources, Summer 1983.

[4] "Bulletin to Management," Bureau of National Affairs, March 18, 1982 documents the geographical differences in turnover. Many economists have noted it as well.

- Business conditions - Over time, quit rates vary inversely with the unemployment rate. In good times (like the late 1960s) quit rates rise and in recessions, they fall. In sectors with seasonal or cyclical demand patterns, like durable-goods manufacturing, quit and layoff rates are much higher than average. Any quit rate model to be applied to the Federal Government would need to be adjusted for the business cycle.

- Age, sex and race - Older employees quit less often than younger employees, and women and minorities have higher quit rates than while men. The reasons seems to be a combination of relative skill levels, opportunities for advancement, and occupational mix. Any quit rate model to be applied to the Federal Government would need to adjust for the demographic mix of the federal sector especially relating to age.

- Pension plans - Pension plans that penalize workers for quitting are an especially important factor in lowering quit rates for longer term employees. [5] Because retirement benefits for federal employees are based on final salary and are not "transferable" quit rates for long term federal employees are naturally very low (thus, the term "golden handcuffs" in reference to the CSRS). Entry - level federal employees, however, have quit rates very similar to those in the private sector.[6]

  Any quit rate mode would have to adjust for the relative weight of retirement in the federal employee compensation package and the disproportionate penalty in retirement benefits suffered by employees leaving federal service.

- Specific training - Employees with skills specific to their current employers generally have low quit rates.

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[5] See, for instance, Gary Becker, "Investment in Human Capital: A Theoretical Analysis," Journal of Political Economy, October 1962.

[6] Staff report, House Budget Committee, January 1985.

Such employees could not easily find comparable jobs elsewhere and thus tend not to quit as readily as "generally trained" workers.

Any quit rate model would have to adjust for the effect of different levels of specific training in the Federal Government.

- Turnover costs - Similarly, employers who find it costly to replace employees, either because of specific hiring costs, training, or the lower productivity of new workers, will have lower quit rates.

- Any quit rate model would have to adjust for differences in hiring and training costs in the federal sector.

Thus, to implement quit rate theory into practice, a useful comparison would have to separate the effect of pay from the effects of firm size, business conditions, occupational mix, pension plans, geographical location, and demographic factor such as age, race and sex. The methodological problems of quantifying lost productivity, training cost and the federal - private differential in retirement benefits are extremely complex.

Thus, even if theoretically correct, the use of quit rates to set pay in practice would be impossible to implement.

III. The OPM Report:

Even if linking pay to quit rates was rational and possible, (which it is not) the OPM proposal does not present a single valid argument for its adoption. OPM's report uses inaccurate and biased data, is vague and inconsistent, and ignores long-term issues to achieve a short-term budget reduction.

First, the OPM report insists that federal quit rates "are much lower than those in the private sector." A chart compares a federal quit rate of 3.8 percent to a BLS manufacturing quit rate of 18.2 percent, a BNA non-manufacturing quit rate of 18 percent, and a Postal Service quit rate of 13.4 percent.

In fact, the quoted Postal Service quit rate is from 1969, a time of low unemployment and buoyant business conditions, much different from the 1981-1983 recession. According to OPM's own source, Postal quit rates had dropped to 6.7 percent by 1972 and to 4.4 percent by 1976. Since 1972, they have consistently been much lower than quit rates for other federal employees.[7]

The BNA figure quoted as a quit rate for private non-manufacturing is actually a "separation" rate that includes retirements, discharges, and other involuntary separations. It is not a "voluntary quit rate" as OPM claims.[8]

The BLS manufacturing quit rate used by OPM is that of durable goods manufactures in 1981: firms with an average of only 60 employees, cyclical employment patterns, low skills levels and low turnover costs. A more comparable figure is that of the telephone communication industry, with an annual quit rate of 3.6 to 4.8 percent.

In fact, OPM's previously published reports give 1981 and

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[7] Douglas K. Adie, op.cit.

[8] "Instructions for BNA Quarterly Survey." Bureau of National Affairs.

1983 quit rates for federal employing of 7.99 and 7.03 percent, respectively. [9]Since thses figures do not agree with those in Reforming Fedral Pay, some groups must have been excluded. While both Post Office and BLS figures include blue-collar, part-time and temporary employees, we suspect that OPM's figures for federal employees do not.

OPM's second assertion is that federal quit rates are lower than those in the private sector "for just one reason: overall, compensation is too high." As explained above, firm size, business conditions, occupational mix and pension plans are all reasons why the federal quit rate cited would differ from the other quit rates.

A recent economic study of the same data, concludes that "much of the difference between the quit rate in the government and the private sector can be accounted for by the larger size of the government." [10] With an unbiased model, pay is not the crucial factor.

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[9] Federal Civilian Workforce Statistics, Monthly Release, Office of Personnel Management, December 1981 and December 1983.

[10] Kathleen Classen Utgoff, op.cit.

Finally, OPM concludes that federal pay should be "frozen or actually reduced until ... quit rates become similar to those in the private sector," and suggests a target quit rate of 12 percent.

The 12 percent target is not only arbitrary but dangerous, because it ignores the high levels of specific training and turnover costs in the Federal Government. While quoting a study by Douglas Adie to support their conclusion, OPM neglects to mention that Adie recommended a 12 percent quit rate for non-supervisory Post Office personnel only. His report specifically notes that " ... one must be cautious in applying these figures to individual businesses other than the Post Office ... (they) should not be specifically applied to industries producing quite different products, using different technologies, and hiring workers under different labor conditions." [11]

The inapplicability of quit rates as an indicator of pay can be directly established from the OPM report. Their Table IV shows that OPM believes that the pay gap is greatest for the highest grades (GS-14 and 15) yet the quit rate for the high grades is lowest in the federal sector -- directly opposite the conclusion the quit rate theory would predict.

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[11] Douglas K. Aide, op. cit.

In fact, there are very good reasons why federal quit rates should not be reduced, especially by a 5 percent wage cut. Although OPM asserts that higher quit rates would bring "more fresh talent into the government," the fact is that they would both drive the best employees out of federal employment and seriously hamper recruiting.

Far from being an easy method of budget reduction, a pay cut and higher quit rates would actually decrase productivity and increase turnover costs -- leading to much higher personnel costs in the long run.[12]

Given the necessity of instituting a costly occupation-by-occupation survey of public and private sector quit rates to account for differences in firm size, etc., OPM's quit rate proposal is inappropriate in theory, costly in practice, and dangerous with regard to the implementation they suggest.

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[12] See, for instance, Donald O. Parsons," Specific Human Capital: An Application to Quit Rates and Layoff Rates," Journal of Political Economy, November-December 1972.

The fact remains Congress has already mandated a pay system that is based on the supply and demand for labor. It's called comparability.

ATTACHMENT

10/7

THE WASHINGTON POST

OPM Director Blames Ferraro

'Made Me' Question Voter Drives in 3 States, Devine Says

By Pete Earley
Washington Post Staff Writer

A Reagan administration official yesterday blamed Democratic vice-presidential nominee Geraldine A. Ferraro for letters that he sent to the governors of Ohio, Texas and New York questioning the legality of voter registration drives by state employes.

Donald J. Devine, director of the Office of Personnel Management, said he was following instructions from Ferraro when he warned the three governors last month that some federal aid to their states might be stopped because employes were registering voters in state offices.

The Democratic governors accused Devine of trying to thwart the drives because people were being registered in all state offices, including employment and welfare offices.

Republican Party officials in Ohio and New York objected to the drives, in part, because they said they were aimed at recruiting persons who would be inclined to support Democratic presidential nominee Walter F. Mondale.

"Geraldine Ferraro made me do it," Devine told the House Government Operations manpower subcommittee.

He said Ferraro told him in a July 21, 1982, letter that he had to enforce a 1970 federal law that requires states to have a merit personnel system similar to the federal government's or face loss of federal funds. When it took office, the Reagan administration called for the law's repeal. Ferraro, who chaired a House subcommittee with OPM oversight in 1982, objected to the administration request.

Devine said Ferraro said states might "return to a spoils system" if OPM did not enforce the Intergovernmental Personnel Act of 1970.

Devine cited a section of the law designed to protect state employes from "coercion for partisan political purposes" and prohibiting state officials from "using their official authority for the purpose of interfering with or affecting the result of an election . . ." as justification for his letters to the three governors.

Subcommittee Chairman Rep. Barney Frank (D-Mass.) called Devine's action a "very unfortunate misuse of federal power for partisan purposes."

Under questioning by Frank, Devine acknowledged that he did not pay any attention to Ferraro's 1982 letter for more than two years.

"The inescapable conclusion is that Geraldine Ferraro had no more to do with this than the moons of Jupiter," Frank told Devine. "This is unworthy of the rhetorical skills used in the past to cover your tracks."

"I assure you that she [Ferraro] was uppermost in my mind when I made the request," Devine replied.

Devine said his letters were not threats, but requests for information. But Texas Gov. Mark White and state officials from Ohio and New York said Devine's letter was threatening.

White said he was "outraged" by the letter, which he described was part of a "coordinated attack by this administration to reduce voter turnout" next month. The Labor Department also has warned Texas officials against using state employment offices to register voters, he said.

Ohio Secretary of State Sherrod Brown said two Republican state legislators filed suits to curb voter registration after Devine sent his letter.

Their actions were part of a "coordinated attempt" by the Republican Party to prevent "certain segments of our society" from registering, he charged.

ATTACHMENT

MANAGEMENT

SPECIAL ISSUE

Volume 4, No. 1 1983

Pursuit of Excellence
Performance Management in Government for the 80's

Patronage model. Chicago—America's "best run" city—will have at least 250 political appointees on its payroll, says the federal judge who struck down the city's famed "patronage" system.

"That's too low!" complained newly elected **Mayor Washington.** He feels the 250 figure (which is .6 percent of the overall work force) should be upped to 1,200 (approximately 3 percent).

All of which compares with the almost invisible presence of political job slots in the federal government—.015 percent. Interestingly, as a congressman in Washington, D.C., Chicago's newly elected mayor strongly criticized the Reagan Administration for making too many political appointments.

Fonda's fable. Jane Fonda's portrayal of a liberated secretary in the movie **Nine to Five** seems sincere. Challenging this image, however, is a recent sex discrimination suit against Fonda by three women who used to work at *Jane Fonda's Workout* in San Francisco.

They charge that Fonda paid them $6 an hour to train customers on Nautilus equipment while two male employees got $7 for the same work. One of the women, **Mary Conn**, 29, says bitterly. "Jane stands for so much—women's rights and all these good things—but she doesn't follow through."

The *Nine to Five* parody of office life harshly criticizes such poor management tactics by characterizing the male supervisor as a tyrant ruling his female subjects.

No settlement has been reached yet in the discrimination suit, but it appears the judge will decide who's the real-life heavy at Fonda's spa. (Ed. Note: Fonda's present problems are not unprecedented, however, as she posed for a military recruiting poster in the early 1960's. Some years later, Fonda gained world-wide publicity by posing on a North Vietnamese anti-aircraft gun, one part of a deadly air defense system that killed hundreds of America's fighter pilots.)

Rising sun, shrinking agencies. Buoyed by electoral gains in upper-house elections this summer, **Japanese Prime Minister Nakasone** surprised many observers when he suddenly proposed major cutbacks in the country's federal work force.

Nakasone, who served as head of Japan's version of the Office of Personnel Management before becoming Prime Minister last year, is also calling for internal reforms which would increase employee efficiency in government offices.

Launching a campaign to increase employee performance in highly-motivated Japan sounds almost like a management impossibility. In fact, their civil service has lagged far behind the dynamic employee-management affairs in Japan's amazingly productive industrial sector.

Sino-expert **Milton Friedman** says Japan's public service system is almost moribund in an "employee protection" straightjacket which was adopted in the mid-1950's. "Don't expect the reforms to be resolved without a fight," warns Friedman, "the Japanese are both the most obliging and most stubborn people on earth." Nakasone has called for setting his changes in place by year's end. Sound familiar?

Play the manager game. In "Ten Keys to Managerial Success," (**National Business Woman.** April/May 1983) **Drake University's Marjorie Prentice** discusses the results of 200 hours of conversation with successful women managers.

Women will be rewarded—as men are—for taking "calculated risks," showing initiative, and learning from their mistakes, says Prentice. This strategy doesn't guarantee success, but it helps women compete in the male-dominated game of upward mobility.

Speaking of upwardly-mobile women execs, Prentice advises, "You should learn how to use these behaviors to your advantage since risk taking and initiative are qualities related to effectiveness."

Make mistakes or you're fired! Chairman of Continental Telecom Inc. (CTI), **Charles Wohlstetter**, believes in taking risks.

He urges new managers to vocalize even their "wildest" ideas if they hope to survive in his organization, the nation's **third largest non-Bell telephone system**. Ideas are valued as a sign that managers are thinking, a quality Wohlstetter has cherished since taking his first job in 1929.

Wohlstetter rejects the view that

ATTACHMENT

United States Government
MEMORANDUM

Of
Personnel Manag

Subject: Pay Equity Bill

Date 14 MAY
In Reply Refer T

From: James L. Byrnes James L. Byrnes
Deputy Associate Director
for Staffing

Your Reference

To: Donald J. Devine
Director

In reviewing our options on standards setting and job evaluation, it occurre to me that we have not adequately investigated one option. This i especially pertinent now since Bob Moffit tells me there is good chance the House might pass Representative Oakar's Pay Equity Bill.

We know that a "comparable worth" system will not work. We do know, however, that job evaluation systems can be biased to produce the results favored by proponents of comparable worth, i.e., equal wages for male and female occupations. I recently referred to you an article which showed how certain standards could be manipulated so that any job evaluation technique could have male and female dominated occupations paid equally.

If the Oakar Bill passes, it would be a tremendous opportunity for OPM to develop a real comparable worth system, and show how preposterous it would be. The Federal Government's classification systems--which OPM has tried to change for years--are confusing and inefficient in any event, so a little more irrationality wouldn't hurt that much. But it would show a clear picture to the private sector about how ridiculous the concept of comparable worth is, and that in fact it is only job discrimination. It is truly wage-setting by administrative fiat. Only in this case, it would be under your control.

The political possibilities of this situation should not be underestimated. By doing job evaluation across clerical and blue collar occupations, a comparable worth study would immediately divide the white collar and blue collar unions. This would not be limited to those in the Government, although there are a large variety there who also represent outside interests, but it would also directly affect the private sector unions. Since our occupational standards are often applied outside Government, private sector unions could not afford to let the Government go too far. The blue collar craft unions would especially be concerned, since they would be the inevitable losers in such a comparable worth adjustment process. Moreover, the unions would be pitted against the radical feminist groups and would further divide this constituency of the left. Rather than allowing

Oakar to manipulate the Administration on the gender issue, we could create disorder within the Democratic House pitting union against union and both against radical feminist groups.

This situation presents opportunities that we should not ignore. Of course, it is a dangerous course, but it might change the nature of the whole debate on comparable worth.

STATEMENT OF
GEORGE A. HOBT
DIRECTOR OF PAY AND CLASSIFICATION
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(AFL-CIO)

BEFORE THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS

U.S. HOUSE OF REPRESENTATIVES
TO
INQUIRE INTO THE STRATEGY OF THE
OFFICE OF PERSONNEL MANAGEMENT REGARDING PAY EQUITY

May 30, 1984

I am George Hobt, Director of Pay and Classification of the American Federation of Government Employees (AFGE). AFGE as the largest representative of both blue collar and white collar federal employees welcomes the opportunity to appear today and to present our views on the events leading up to, during and subsequent to Office of Personnel Managements (OPM's) Director Donald Devine's meeting on the morning of May 22, 1984.

We very much appreciate the Subcommittee's timely and expeditious investigation of what has been reported to have been a deliberate attempt by OPM to use the power and official labor relations channels of its Office to deliberately mislead and divide the unions and others in an effort to thwart legislation dealing with the question of pay equity in the federal government.

Early in the morning of Monday, May 21st, 1984, members of my office began receiving reports of an "important" meeting dealing with the federal classification systems to be held at OPM the next morning, Tuesday, May 22nd. We first thought our invitation to this meeting had been misrouted or was lost somewhere in the normal distribution channels or through some oversight we'd not been invited. By noon Monday and several phone calls later, it began to become clear there was no oversight or lost invitation, it was by then obvious that AFGE and several other large federal unions had not been extended an invitation to this meeting.

By this time, I'd obtained a copy of the invitation sent to the Metal Trades Department of the AFL-CIO and I placed a call to Director Devine at the number shown in that mailgram. When I asked to speak to Director Devine, the person taking calls, informed me "the Director was in a meeting". I then asked to speak to Pat Korten and was told "he was out, could I leave a message". When I said I was calling about the Tuesday meeting, she said, "oh, let me check my list", she left the phone and came back a moment or two later and said, "The Director will call you when he gets out of the meeting."

By 2:00 p.m. no call had been received and I returned a call to that same number and again asked to speak to Mr. Korten. He came on the line and asked how I was and what he could do for me. I told him I was somewhat confused as we'd heard rumors of an important meeting Tuesday and for some reason we'd not received an invitation. He said that he'd not worked on the list, staff had done that, he did know that the Metal Trade workers and NAGE were on the list, but he thought it had been limited to those that were representatives of predominantly blue-collar workers and asked whether AFGE was not predominantly a white collar union. I interrupted him at this point and said, "wait a minute, Pat, we represent more blue-collar workers than all of those other unions put together and I can't conceive you would have a meeting of this importance and not invite AFGE."

We talked a little further and he said he would check with Don and call me back.

At approximately 4:10 p.m., my office received a call from Mr. Korten. I returned that call a few moments later and he told me, "Don just stopped in for a moment he was on his way to a meeting at the White House but he has no problem with your attending and would welcome your input."

At 11:00 a.m. the morning of May 22nd, most of the participants from the labor organizations had assembled at the Executive Conference Room at OPM Headquarters at 1900 E Street. At approximately 11:10 a.m., Director Devine came in alone then went out for a few seconds and came back in accompanied by Mr. Korten.

He first introduced himself and then asked everyone else to do the same. Following the introductions, he then with aid of an overhead projector and several transparencies began a presentation of the makeup, pay structure, grades, population and classification systems of the two major federal systems, i.e., the General Schedule and Federal Wage Systems.

As he proceeded through his presentation, he kept referring to "legislation" that would force him to combine or merge these two separate and distinct systems and to his opinion that the

Factor Evaluation system used for classifying most of the General Schedule positions was a far more precise system than that used for classifying blue-collar positions and that if this legislation were enacted, he would be forced to classify all jobs both blue and white-collar under the FES system. He had a slide of one chart comparing two pyramids one for each system side by side and another with arrows showing how four blue-collar jobs would decline to what he purported to be the proper lower GS levels under this merger. One example showed a sheet metal worker going from a pay level of a WG-10 to a pay level of a GS-9 nurse, a reduction in pay of several thousand dollars.

He also expressed several times that this legislation forcing him to combine and evaluate all positions under one system allowed him only seven months to do so. It was at about this point, well into the meeting, that it first became clear he was talking about the pay equity or comparable pay for work of comparable value legislation. We then objected, that if this is what he wanted to discuss, then why didn't he let us know and we would have been much better prepared to discuss that subject. As it was, no one at the meeting including Mr. Devine, had a copy of the latest legislation with them!

He then sent out for a copy of HR 5680 and then a long give and take discussion and debate ensued on what the bill requires or didn't require. Throughout the discussion, Director Devine complained about the mere seven months he would have to complete this merger and evaluation and the dire consequences it would have for blue-collar employees. He made a number of statements in support of these complaints such as:

> "I won't be here forever, I'll always be in politics but you people will still be here and will have to face this problem with your people".

Every time we would counter with our understanding of the legislation or attempt to allay some of what we thought at the time were his genuine concerns, by statements such as:

- If seven months is too little time, how much do you need?

- The bill doesn't require you to merge the systems or to identify all wage disparity, only that which is or could be as a result of discrimination.

- There is pay inequity in both systems; how would merging them solve that?

- The mention of prevailing rate in the legislation is only to clarify that the comparison of jobs be in the same system and at the same pay base.

He would return to his research and analysis of the court cases and the literature that he said always compared a white-collar female occupation with a blue-collar male occupation and his perception of what a massive, complex and damaging task of the bill would require.

As the discussion ended and the meeting closed, I asked if we could have a handout or a copy of the transparencies used for his presentation. He hesitated a moment, and then very firmly as he exited said, "No!"

Discussion of this meeting with some of the other unions later that day revealed that generally we all shared the same views.

- Director Devine was adamantly opposed to the legislation and we felt he was overreacting as to what it would require;

- While we all felt he had played some little game with who was originally invited, I think throughout the meeting and shortly after at least we all gave him credit for being sincere in at least some of his concerns.

The release the next day, however, of the newspaper report the Byrnes' memo I think removed any doubt from our minds as to the real reasons behind the original structure and the purpose of this meeting.

I feel if the newspaper account and what I've been told is a copy of the Byrnes memo are accurate, then all of us, the Congress, unions, working people and especially working women both in and out of government are all the victims of a very real tragedy if we have these kind of people in responsible positions in government that would go this extent for purely political motives.

Thank you again for this opportunity to appear and I'll be more than happy to answer any questions you might have.

ATTACHMENT

February 17, 1983

To The President's Pay Agent
c/o
Mr. Donald Devine, Director
Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415

Dear Mr. Devine:

In December of 1980, the major representatives of federal General Schedule employees felt compelled to return to and participate in the Federal Employee Pay Council structure as intended by law. We were at that time optimistic and hopeful the new Administration would care enough about the well being of its employees to recognize their obligations under the law to meet with us in good faith and re-establish and maintain a fair, equitable and credible federal pay system, and establish a meaningful relationship with the federal unions. Unfortunately, those hopes and that optimism were not well founded.

Possibly, we should have realized when it took seven months to receive a formal reply to our first offer and yet another year before the first meeting between the Pay Agent and the Council members that the Administration had no intention of treating federal employees or their unions with any degree of respect or concern.

The best thing that can be said of the dismal relationship that evolved out of our offer of a cooperative effort is that only three meetings were held and used as just another forum for this Administration's anti-employee and anti-comparability rhetoric.

The February 9th meeting only served to confirm our worst fears and to shatter any illusions we might have had with regard to any commitment of this Administration to pay comparability. It is also unfortunate that under our 'government of laws not people' that supposedly responsible people in that government can pick and choose which laws they will enforce and obey and those that they disregard or circumvent. We also feel it ludicrous that the chief personnel officer of the largest employer in the free world could, for example, expect responsible union leaders to discuss as an alternative pay system, for employees for whom comparability is required by law, a system that by his own admission, "to his knowledge has never been used in any work place, public or private".

All America is tired of hearing the monthly promise that "things are really bad today, but they are going to get better". Attention to the problems of federal pay cannot be deferred longer based on this shallow promise, nor should federal employees nor their leaders expect them to be.

Irreparable damage has been done to the federal work force over the last two years by those political zealots at the top of this Administration who fail to realize their job is to run the government not ruin it, and they are obliged to lead and support their employees, not to belittle or beleaguer them at every turn.

The telling blow to any good faith negotiations came between the meetings of December 20, 1982, and February 9, 1983. While at the December meeting we were lead to believe we had established some common ground for discussion of the issues, we saw the Administration take advantage of the intervening time to release a barrage of public attacks on virtually every aspect of federal compensation.

For all of these reasons, it is our unanimous opinion that further meetings at this time between the Pay Agent and the Council would be fruitless. If in the future we're given some indication of a positive change in the Administration's attitude, we stand ready to fulfill our obligations under the law.

Sincerely,

K T Blaylock
Kenneth T. Blaylock
American Federation of
Government Employees, AFL/CIO

Vincent L. Connery (cjs)
Vincent L. Connery
National Treasury Employees
Union

John N Sturdivant
John N. Sturdivant
American Federation of
Government Employees, AFL/CIO

James M. Peirce
National Federation of
Federal Employees

John F. Leyden
Public Employees Department, AFL/CIO

cc: Director Stockman, OMB
Secretary Donovan, DOL

BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Subcommittee On Compensation And Employee Benefits, Committee On Post Office And Civil Service House Of Representatives

Federal White-Collar Special Rate Program

About 34,000 out of 1.3 million white-collar positions under the General Schedule pay system are authorized pay rates higher than the statutory pay rates. These special rates, which will cost about $102 million in fiscal year 1984, are offered to attract and retain employees in shortage occupations or in high pay areas. Since 1981, the Office of Personnel Management (OPM) has limited or denied pay increases for most special rate employees even though there are substantial pay disparities between private sector and federal salaries. OPM has based its decisions on information indicating that the staffing situation in these occupations has improved or stabilized despite the pay disparities. Agencies, however, believe OPM's decisions are affecting their ability to attract and retain well-qualified individuals and are resulting in extra training and recruiting costs, more overtime, productivity losses, work delays, and other problems.

Several alternatives to the special rate program are under consideration that may be more effective and could address specific staffing problems. These alternatives are summarized in the report.

GAO/GGD-84-54
MARCH 30, 1984

AGENCIES' AND EMPLOYEES' REACTIONS TO OPM'S PAY ADJUSTMENT POLICIES AND PROCEDURES

Agency officials charged with program administration and employees covered by special rates are concerned about the effect of OPM's pay adjustment decisions. For example, in a January 1982, letter, the Secretary of Defense requested that the Counsellor to the President persuade the Director of OPM to reverse his decision and grant all special rate employees the full 4.8 percent fiscal year 1982 General Schedule pay increase. The Secretary stated that:

> "I am quite concerned about the effect that OPM's decision may have on our ability to recruit and retain employees in manpower shortage category occupations. Coming at a time when recruitment and retention problems associated with engineering and medical occupations are rapidly increasing this action may do irreparable damage. It not only will mean that our recruiters must continue to offer lower salaries, but will be viewed by current employees as a drastic departure from past practice and a signal that the future of special schedules is in jeopardy even though they may be fully justified."

The Secretary went on to say that:

> "While I agree that the annual review should serve as the basis for all final decisions concerning the appropriate level of special schedule rates, I do not believe the granting of the general pay increase prior to such a final adjustment has any negative impact on the effectiveness of the special schedule program. I believe that this is particularly true this year, since the general survey of private sector rates reflected an overall average increase significantly greater than 4.8 percent . . . .
>
> "With regard to the costs of the program, I recognize that not granting the general pay raise to special schedule employees will result in identifiable savings in terms of salary costs. I believe, however, that any such savings will be more than offset by the resulting damage to our ability to recruit and retain quality employees for our critical occupations."

Later, in August 1982, both the Deputy Secretary of Defense and the Secretary of the Air Force reiterated DOD's earlier concerns. They requested that the Director of OPM waive changes to the special rate request and approval process to alleviate employee and agency concerns that special rates were not being increased equitably. In this regard, the Deputy Secretary of Defense stated that technical problems should not delay the October 1982 adjustment in special rates and went on to say that:

> "Our particular concern relates to the salaries of engineering and certain medical occupations. The salary data gathered for these occupations last year clearly indicated that, even after the February adjustment, Federal salaries were well below private sector salaries for comparable jobs. In addition, recently released Bureau of Labor Statistics data shows that private sector salaries have risen 8 to 10 percent above the levels of a year ago. When the resulting salary lag is considered in combination with the increasing staffing problems associated with these occupations, it is obvious that a sound basis already exists for granting the 4 percent increase in October."

Other agency officials expressed similar concerns about OPM's actions. For example, in September 1982, the Administrator of NASA wrote to the Director of OPM about potential OPM actions to freeze engineering special salary rates at 1982 levels. The Administrator stated that he could not

> ". . . overstate how damaging such an action would be to the ability of NASA to continue its mission . . . The increasing disparity between private sector science and engineering salaries and Federal science and engineering salaries must be diminished if we are to maintain our technological excellence. . . ."

Likewise, in December 1982, the Assistant Secretary for Administration at Commerce, wrote to the Director of OPM about OPM's decision to deny patent examiners the 4 percent general pay increase. The Assistant Secretary stated that:

> "We believe an adjustment in these rates is essential for the [Patent and Trademark Office (PTO)] to remain competitive in recruiting and retaining top quality people in sufficient numbers to accomplish the Administration's goal of significantly reducing the patent pendency rate . . . .
>
> ". . . Not only does this action place us at a serious competitive disadvantage; it has raised strong feelings among our newly recruited patent examiners that the Federal government has, in some way, violated a trust . . . .

> "I am concerned that the patent examiner's attitudes, the disparity in salary rates, and the potential of an improving economy will make it extremely difficult for PTO to . . . [recruit and retain employees] . . . . It would be both short sighted and negligent for OPM to not take these factors into consideration particularly after the recent successful recruiting campaign by the PTO . . ."

Many special rate employees are also concerned about OPM's actions and have sent letters to OPM, the President, and Members of Congress expressing the opinion that OPM was not only unfair but also discriminatory. For example, in a November 1982 letter to OPM, a group of licensed vocational nurses in San Diego questioned why they, as employees covered by special rates, were singled out for denial of the "cost of living increase that President Reagan stated all Federal employees were to receive." Likewise, in another letter to the President, a medical technologist at the VA Medical Center in San Francisco called OPM's October 1982 decision arbitrary and insensitive to the needs of the Medical Center and employees. At the same time, the Chief of Clinical Pathology at the same hospital sent a letter to the Congress and called OPM's actions "incomprehensible" and "damaging to the delivery of health care to Veterans."

A joint suit questioning the legality of OPM's decision to deny special rate employees the same increase granted regular rate employees has been filed in federal court by the National Treasury Employees Union and the Patent Office Association. The suit is still pending.

AGENCIES BELIEVE THAT OPM'S PAY ADJUSTMENT DECISIONS HINDER PROGRAM OPERATIONS

According to officials at DOD, VA, and the National Cancer Institute (NCI) of the Department of Health and Human Services, OPM's special rate decisions are having an adverse impact on agency program operations. These officials state that they are having difficulties attracting and retaining qualified and experienced employees necessary to accomplish their program missions. In their opinion, OPM is sacrificing work force quality for short term budgetary savings and ignoring other costs agencies are incurring, such as recruiting and training costs and additional overtime. OPM officials on the other hand, advised us that they have not seen any evidence to support the kinds of concerns expressed by some of the agencies. Furthermore, they stated that offsetting costs such as overtime and retraining are considered as elements in determining the level at which to set special rates. In addition, they advised us that under the law, cost alone cannot be the basis used to establish or adjust special salary rates.

We did not make a judgement on the validity of the agencies' requested pay increases since OPM has broad discretion as to when labor market conditions warrant a special pay rate adjustment. The following sections illustrate the problems agencies are experiencing.

Professional engineers and architects nationwide and worldwide

Agency staffing data shows that nationwide and worldwide recruitment and retention among special rate engineering and other technical occupations are a problem and shortages exist. For example, agency staffing data for engineers and architects covered by special rates on a nationwide and worldwide basis shows that between 1981 and 1983 vacancy rates have improved from 18 percent to 14 percent due primarily to the downturn in the economy. However, of the 21,352 authorized positions in 1983, agencies were unable to fill 2,883 of these positions. Two specialties that agencies reported as the hardest to fill were electrical and electronics engineering. Other specialties that were difficult to fill included mechanical, aerospace, and industrial engineering.

While the staffing situation improved slightly between 1981 and 1983, the engineering salary disparity between the federal and private sector continued to widen. For example, the federal special salary rate disparity for entry-level engineers at GS-5 was 47 percent, up 6 percent from 1982; at GS-7, the salary disparity was 29 percent, up 3 percent from 1982. At GS-9 and 11, the pay disparity was 22 percent and 25 percent, respectively, up from 19 percent in 1982.

Because of the large pay disparities, agencies reported to OPM that they were having difficulty recruiting and retaining top quality personnel, and they anticipated this situation would get worse as the economy improves. The Department of Navy, which could not fill 2,000 (11 percent) of the 18,500 engineering and other technical positions in 1983, advised OPM in a letter dated July 29, 1983, that:

> "These professional employees are a critical element in supporting the Department of the Navy's (DON) contribution to the national defense effort. Mission accomplishment is directly related to the maintenance of a state-of-the-art technical work force capable of logistically supporting DON's sophisticated hardware and facilities. The DON continues to experience an intense competition with private industry in the effort to attract and retain both entry level and experienced technical personnel. Over the past several

Senator EAGLETON. I have something else I want to put in the record.

Mr. Chairman, yesterday when Senator Stevens was presiding, we asked for certain materials to be supplied for the record; Dr. Devine agreed, and we agreed on a time to be submitted, Monday, April 15. I now make this unanimous consent for materials to be supplied on or before that same date. I ask unanimous consent that expense vouchers, including but not limited to travel, lodging and meals, for the following six employees of OPM for the period of January 1 through November 5, 1984, be supplied for the record. To explain, Dr. Devine has five positions called regional representatives. One of the gentlemen was ill. Anyway he has five individuals who are regional representatives who did a great deal of traveling with Dr. Devine in the campaign of 1984 and did a lot of traveling with Dr. Devine in 1984. Also Senator Gore wants travel vouchers for Patrick Korten. I ask unanimous consent that the expense vouchers and supporting documents including but not limited to travel, lodgings, and meals for the following six employees of OPM for the period January 1 through November 5, 1984, be submitted and made part of the record, and the six employees are Patsy Ann Seawright; Alan Wandling; Joseph R. Root; Brian Carey; Bertha Sakie last name is Nelson; and Patrick Korten. That is my request.[1]

Chairman ROTH. Without objection.

Just let me say in closing that the committee is scheduled to meet this afternoon at 2:30 in this room to consider the nomination of Dr. Devine. I am currently having a check made to see how many Senators can be present. If there is sufficient number, it would be my intention to proceed.

Senator EAGLETON. On that issue, Mr. Chairman, Senator Stevens and I had a conversation last night and then I think we went on the record. We chatted first and then I think we went on the record. I said I would assure the committee on behalf of the six Democrats in the committee that we would agree to unanimous-consent waiving of the rule—a rule I didn't know about, to tell you the truth—that says you can't have a hearing and confirmation the same day. The six Democrats will be present. So if you are there, you have a quorum. [Laughter.] We will be here at or about 2:30 ready to proceed.

Chairman ROTH. As I say, I am checking the full committee to see how many will be here. Hopefully, we will be able to proceed.

Senator EAGLETON. So that the record is clear, we were asked, I think, by Senator Stevens earlier this week if we could move to an expeditious hearing and to an expeditious markup. I said I was not intending to footdrag this. I was not intending to filibuster by delaying or anything like that, and Senator Stevens indicated he thought that was fine cooperation. He, Senator Stevens, wanted this matter voted on, at least at the committee level, before the Easter recess. I said I thought that was fair. I contacted my fellow Democrats on Monday and said there is more than likely going to be a markup at 2:30 Wednesday. I contacted my fellow Democrats on Tuesday and said it still looked like it was likely there would be a markup at 2:30 Wednesday afternoon. My staff this morning at 9:30 contacted the AA's and secretaries of the Democratic Senators and once again said there would be a markup and that all of us would be present.

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[1] The information referred to may be found in the committee files.

I state that for the record because we are not trying to slow down a timely vote at the committee level on Dr. Devine, and we do that in the spirit of cooperation because we were asked to do so by the majority.

Chairman ROTH. I appreciate the cooperation of the Senator. As I say, I am still checking our side, and as soon as we are able to get a determination, we will let you know.

The committee is in recess.

[Whereupon, at 10:30 a.m., the committee was recessed to reconvene at the call of the Chair.]

RENOMINATION OF DONALD J. DEVINE

WEDNESDAY, JUNE 5, 1985

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The committee met at 10:03 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Mathias, Cochran, Eagleton, Chiles, Glenn, Levin, and Gore.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Good morning.

Today we are going to continue the hearings on the nomination of Dr. Donald Devine to a second term as Director of the Office of Personnel Management. It has been requested that we put on the record testimony relating to the delegation of authority Dr. Devine signed on his last day in office of his first term delegating his authority as Director to the position of Executive Assistant to the Director, which position he subsequently filled.

Because of the nature of these proceedings, as we did in the first portion of the hearings, we will require all witnesses testifying on factual matters to testify under oath. I note that there is a substantial audience and there is a substantial audience outside waiting to get in. So I am going to ask the staff to work out some equitable arrangement so that those of you who are here will be asked to yield your seats for at least a while to some people outside. I don't believe in not allowing people outside to come in for a short period of time also. That does not include agency personnel who are here as part of their duties, nor the press. I take it the press can allocate its own space in some manner.

Let me state in the beginning that I am glad to see the members of the media, particularly the air media. This is a Senate hearing and I have instructed the staff to maintain order. There will be no demonstrations of support or clapping or anything else. This is a very serious matter and we do not intend to turn it into some sort of an indication of support for one group or another by virtue of your response to anything a witness may say before us today.

My good friend Senator Eagleton and I have agreed that we will allocate the time back and forth, and we will yield such time to other Senators as they come in as the two of us believe is necessary.

We are going to proceed to get through the witnesses today, if it is at all possible. There is a bill on the floor. I am sure people realize that.

Our first witness is Dennis Devaney who is a member of the Merit Systems Protection Board. Mr. Devaney, as I indicated, we will have to administer the oath to all witnesses.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. DEVANEY. I do.

Senator STEVENS. Thank you very much. Proceed, please.

TESTIMONY OF DENNIS M. DEVANEY, MEMBER, MERIT SYSTEMS PROTECTION BOARD

Mr. DEVANEY. Mr. Chairman, Senator Eagleton, I appreciate the opportunity to appear this morning to comment on Dr. Devine's renomination as Director of the Office of Personnel Management. I am appearing today on my own behalf. The views I express are my personal views and do not represent official policy of the Merit Systems Protection Board.

As this committee knows, I am the Democratic member of the bipartisan Merit Systems Protection Board. I was nominated for the position by President Reagan on August 4, 1982, recommended for confirmation by this committee on August 17, 1982, and confirmed by voice vote in the Senate on August 20, 1982. A copy of the record of my confirmation hearing is attached as an appendix for the benefit of the committee members.

I think it is important for the committee to realize that I did not know Dr. Devine personally before becoming a member of the Merit Systems Protection Board. We did meet briefly many years ago when both of us were in prior incarnations. Dr. Devine was a professor of mine in a one-semester course at the University of Maryland when I was a graduate student there in 1969. We had no professional or personal contact from that time until I assumed my duties at the MSPB in 1982.

A good part of the controversy accompanying Dr. Devine's renomination has centered on the politicization of the Office of Personnel Management and I am here because I think the debate, at least as I have followed it in the media, seems to miss the mark. And it fails to recognize the significant change made in the role of Director of OPM by the Civil Service Reform Act. Those of you who were present at the creation, and that includes both Senator Eagleton and Senator Stevens, know that one of the principal criticisms of the old Civil Service Commission was that there was an inherent conflict in the functions which the Civil Service Commissioners were statutorily mandated to carry out. On the one hand, the Commissioners, and particularly the Chairman, were to be management representatives and political advisers, and I mean political in the capital P sense of the word, to the President on personnel issues.

On the other hand, the Commissioners then were supposed to take off that hat and turn around and sit as the neutral and fair adjudicators of personnel cases that came before them.

One of the important features of the Civil Service Reform Act was the separation of those functions. The debates on the statute focused particularly on the failure to separate those functions. Congress wanted to avoid both actual conflicts and the appearance of conflicts, and those have been catalogued in many studies, including the Rogovin report.

We all know that during the debates Senator Stevens and Senator Mathias, among others, expressed concern about making the Director of the Office of Personnel Management the administration's point person on personnel and Federal employee issues. The fact is, however, that the statute as enacted did just that. It created the bipartisan Merit Systems Protection Board to be the neutral judicial body hearing cases and appeals of Federal employees while at the same time clearly making the Director of the Office of Personnel Management the President's politically accountable adviser on Federal employee and personnel issues.

I think it is important to note that originally the Senate had decided that the OPM Director could only be removed under the same standards that apply to the Board: neglect of duty; malfeasance in office. In the conference committee, the Congress made the OPM Director removable at the will of the President.

Under the Reform Act, the Director of OPM is to be the administration's representative on policy issues affecting the Federal work force. The legislative history of the statute plainly indicated that the Director is to be the representative of the administration's position and to be management's voice on issues impacting Federal personnel.

It is also quite clear that the statutory framework explicitly recognizes that Presidential appointees confirmed by the Senate are not covered by the Hatch Act. They are officers of the Government; they are not employees. In light of both statute and case law, the Director, as the administration's management expert and political adviser, was within the bounds of the letter and spirit of the law, in my view, in campaigning on behalf of partisan candidates for elective office.

Since I believe that a good deal of the debate on Dr. Devine's renomination has generated considerably more heat that light, I would like to focus on the relationship between the Director of OPM and the independent Merit Systems Protection Board. This relationship could potentially be subject to manipulation if there were overreaching on the part of the Director. That the Congress obviously had some concerns about it is indicated by the fact that questions on this relationship have been asked of every nominee that has come before this committee to be confirmed for a seat on the Merit Systems Protection Board.

Under the statute, this is an area which is on the cutting edge of the institutional relationships set out by the Reform Act and it's an area that I can speak to from direct personal knowledge. After almost 3 years on the Board, I can state categorically that Dr. Devine has been completely professional in his relationship with the Merit Systems Protection Board. He has scrupulously respected the independence of MSPB and at the same time has played a role which I believe the statute calls for as an aggressive advocate for management before the various judicial tribunals created by the Reform Act.

On two occasions, pursuant to provisions enacted by the Congress, MSPB asked for advisory opinions from the Director in order to draw on the statutory expertise of the Director of the Office of

Personnel Management. Under Dr. Devine's leadership, OPM has fulfilled its responsibility as intervenor on behalf of management in various cases before the Board and in the courts. I believe OPM has professionally carried out its duties with respect to this very significant responsibility.

This, of course, does not mean that they have won them all. Like any party appearing before a judicial agency, OPM has won some and they have lost some. But I can say unhesitatingly that the representation of the Government and of management's perspective has been of the highest quality.

In my view, Dr. Devine should not be criticized for advocating the administration's position on Federal personnel issues. According to the law, that's exactly what he is supposed to do. President Reagan wants him to continue the job. Using any criteria that the Senate has applied to nominees in the past, I believe that Dr. Devine deserves to be reconfirmed.

That is a summary and the close of my statement, Mr. Chairman. Let me just add that one of the things that prompted me to appear today was my concern that, as Chuck Yeager and the test pilots would say, a lot of folks who have been discussing this issue have been operating way out there by the edge of the envelope. I have a great deal of respect for Senator Eagleton and his service in the Congress but let me preface my remarks by reading something to you. "He instigated actions that have resulted in his being named plaintiff and defendant in 160 court cases and 260 cases before the MSPB, the administrative tribunal for civil servants."

As I indicated, the Director of OPM is management's representative. If an arbitrator rules for an employee and management decides to appeal it, that case is stylized in the courts, *Devine* v. *White, Devine* v. *Sutermeister, Devine* v. *Nutt.* In every retirement case heard by the Merit Systems Protection Board, the Office of Personnel Management is a defendant. So to suggest that somehow the number of cases that Dr. Devine is named in as plaintiff or defendant impacts on the job he is doing is just off the mark. Frankly, if he was not a defendant and plaintiff in cases, you would say he was not doing his job.

He has the power to intervene before the MSPB pursuant to statute to represent the administration's position. He can ask the Board to reconsider policy. If he doesn't win at the Board level, he can go to court on behalf of management's perspective. Obviously that brief quote I read is from Senator Eagleton's letter to the Wall Street Journal. Thank you, Mr. Chairman.

Senator STEVENS. Thank you very much. I appreciate your appearance here today.

The subject of this hearing is the delegation of authority from the Director nominee, Dr. Devine, to a new position that was created on the last day he was serving his first term. Did you have any knowledge of that?

Mr. DEVANEY. I do not have any direct knowledge of that, Mr. Chairman, and, therefore, would not be in a position as a lawyer to comment one way or the other. I might say——

Senator STEVENS [interposing]. Well then, don't comment on it.

Mr. DEVANEY. OK, fair enough.

Senator STEVENS. Senator Eagleton.

Senator **Eagleton**. I have no questions.

Senator **Stevens**. Senator Gore.

Senator **Gore**. Would it be appropriate for me to do a brief opening statement now, Mr. Chairman? I was a little late getting here. I can just put it in the record.

Senator **Stevens**. Senator, it is up to you. We did not have any opening statements this morning other than a brief statement of what the subject was.

Senator **Gore**. I had understood that, Mr. Chairman, but let me just say a few words briefly. I understand this witness does not have any direct knowledge of the subject matter of today's hearings.

Senator **Stevens**. Senator, I might point out to you that none of us do, so I would urge you to realize the manner in which we opened the hearing because we don't know the facts yet. I hope you are not going to comment on the facts before we hear them.

Senator **Eagleton**. We are not babes in the woods. We interviewed witnesses.

Senator **Stevens**. They have not been under oath, Senator. Proceed as you wish, Senator.

OPENING STATEMENT OF SENATOR GORE

Senator **Gore**. Thank you very much. I will certainly heed what I take to be the chairman's implicit reminder to be fair and I will certainly do so, but I don't come here with a tabula rasa as to the facts of what the hearing is about. I think in some respects it is unfortunate that we are here exploring yet another reason why, in the opinion of some of us, Dr. Devine should not be reconfirmed to head the Office of Personnel Management. I use the word unfortunate because in my opinion it is high time that the administration thinks about sending us another candidate. At this committee's first proceeding, my colleague from Missouri, Senator Eagleton, amply explored Dr. Devine's extensive political activity so uniquely inappropriate as head of the civil service. Nonpartisan traditions are almost nearly a century old now.

Moreover, serious questions have been raised about Dr. Devine's managerial capability. We discussed, for example, at the committee's first proceeding how he had allowed the reserve funding underpinning the Federal Health Program to grow to a sum of over $2 billion, more than twice what was needed.

At a subsequent proceeding before the Permanent Subcommittee on Investigations, an interagency initiative to revamp the system of granting security clearances was being examined, a much needed effort, and recent publicity about the Walker spy ring has focused new attention on the extreme importance of having a sensible method for granting security clearances to individuals in this Government and in the employ of contractors handling confidential material, to make certain that those individuals are cleared properly. Yet during that hearing, which took place between our last hearing on Dr. Devine and this one, the subcommittee learned that Dr. Devine made a shambles of the new administration initiative to reorganize and strengthen the security clearance procedure. He unilaterally issued his own regulations without consulting with the members of the committee that was supposed to be coordinating the interagency effort. He caused tremendous consternation to the Department of Defense, the Department of State, the intelligence community, and it created the ridiculous situation where, under Dr. Devine's unilateral orders, people who do not have access to classified material are required to get much more extensive security checks than people who do have access to confidential material. If he had had the cooperative approach that would have led him to simply consult with the State Department and the Defense Department and the White House before he unilaterally went ahead like a bull in a china shop, then he could have avoided this situation. And this incident will sound familiar to those who have explored other activities on the part of Dr. Devine.

So, Mr. Chairman, I not only am concerned about Dr. Devine's political approach to the job, but I also have grave doubts about his managerial competence in the job.

In this hearing, we are expected to learn about an additional complaint—Dr. Devine's alleged actions in which he virtually appointed himself the ex officio Director of this agency. Dr. Devine apparently has demonstrated a low regard for the established processes for confirmation to this job. While I look forward to hearing his explanations, I have some doubt that there is a reasonable one. However, I will keep an open mind and listen carefully. It does seem to me he simply took the law into his own hands, and I appreciate your courtesy in letting me make that statement, Mr. Chairman.

Senator STEVENS. Thank you, Senator.

It is not a court of law, but I do hope we will try to keep this hearing within the scope of the issues that have been brought to life since the other hearings have closed. I know there has been information provided to members of the committee in response to questions that were asked at that first hearing that certainly Senators should have the right to explore. I don't know how successful I am going to be, but I hope we can prevent turning this into a second confirmation hearing, and that, Mr. Devaney, is why I sort of responded the way I did to you. Did you have any questions or opening statement, Senator?

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Mr. Chairman, I wanted just to thank you for chairing this hearing this morning because I think it is important for us to look into these allegations that have been raised. I don't come here with any preconceived notions, though, about whether the nominee ought to be confirmed or not. Obviously some on the committee have made up their minds and are here to simply enlarge upon those reasons or those notions that have already been reached. Maybe there is a basis for it other than just disagreeing with the fact the President ought to have his own people running the executive branch. I think there is a strong argument that can be made for the fact that the President has that right and whether a Senator agrees or disagrees with his choice is not what we are here to discuss or differences of how the office could have been operated if somebody else may have been there. I am hoping that we can find out whether or not there is any basis for rejecting this nominee. If there is any evidence of that, I hope we can hear it. Thank you, Mr. Chairman.

Senator EAGLETON. May I clarify for the record that this is a second hearing on the nomination of Dr. Devine. You said you hope we can avoid having it be such. That is what this is. This is the second day of hearings on the nomination of Donald Devine based on information discovered since the last hearing, records that have been produced that will be the subject. I don't think the hearing is going to take all that long, Mr. Chairman.

Senator STEVENS. I appreciate that. The Senator is correct. There are no rules of the committee to limit the scope of inquiry of a Senator during a nomination confirmation hearing. It was my hope we would not become redundant in the matters we went into extensively at the first hearing.

Senator Chiles, do you have any comment?

Senator CHILES. No, sir; I will reserve mine.

Senator STEVENS. Senator Gore?

Senator GORE. Very briefly. I want to say I happen to agree with the Senator from Mississippi. In most cases the President should have his own choice, appointee. That is certainly not the basis of the tentative conclusion that I have reached that Dr. Devine should not be reconfirmed. That tentative conclusion on my part is based on the first hearing we had. I want to say to the chairman, certainly I am one member who will try to keep this hearing as brief and reasonable as possible, but I also agree with Senator Eagleton, since it is a second confirmation hearing, I hope the chairman won't be upset if we want to explore questions that are relevant to the subject at hand; that is, whether or not he should be reconfirmed.

Senator STEVENS. Thank you very much. Thank you, Mr. Devaney.

Our next witness is Loretta Cornelius, the Acting Director—Dr. Cornelius, I might add, as a result of completing your degree courses. We are pleased to have you, Dr. Cornelius, join us today. You are accompanied, I understand, by the general counsel, Joseph Morris, and the Associate Director for Administration, William Hunt. Since you probably all will be answering questions, why don't you all take the oath.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. CORNELIUS. I do.

Mr. MORRIS. I do.

Mr. HUNT. I do.

Senator STEVENS. I would remind those in the audience that by direction of the committee, there is a no-smoking requirement in this room.

We are pleased to have you here, Dr. Cornelius. Do you have a statement you want to read? We want to accord you the privilege of proceeding as you wish to do so.

TESTIMONY OF LORETTA CORNELIUS, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY JOSEPH A. MORRIS, GENERAL COUNSEL, AND WILLIAM M. HUNT, ASSOCIATE DIRECTOR FOR ADMINISTRATION

Ms. CORNELIUS. No, Mr. Chairman, I do not have a prepared statement, but I am here to answer any questions you or any members of the committee may have. At your request I am accompanied by Mr. Hunt and Mr. Morris.

Senator STEVENS. Thank you very much.

Let me ask you a series of questions then. I hope you realize we are just seeking information and certainly at least for myself, I have no reason to have any question about the manner in which you proceeded in this matter. We have been told that prior to the termination of Dr. Devine's first term, he signed some papers which delegated authority to a different position. Were you notified of such a delegation of authority before you created the position which was known as the Executive Assistant to the Director?

Ms. CORNELIUS. No, sir, I was not.

Senator STEVENS. When did you create that position, the Executive Assistant to the Director?

Ms. CORNELIUS. It was on March 25, the last day of Dr. Devine's term as Director.

Senator STEVENS. Could you tell the committee the circumstances which led you to create that position?

Ms. CORNELIUS. Dr. Devine had spoken to me earlier about creating a position for him in the event that his confirmation was not completed by the time his term expired. It was not discussed after several weeks and on the day of the termination of his term, I went into his office at his request and he had some papers for me to sign. One was the form 52 which hired him into the position as the Executive Assistant. There were two job positions there and one was the Executive Director, one was the Executive Assistant, and I said I would have a problem with the title of Executive Director, so we took the Executive Assistant position.

Senator STEVENS. I am going to ask my assistant to give you some papers that we have been provided to see if these are what you are talking about.

As I understand the situation, there is nothing unusual about that. We have people who are nominated to positions that require confirmation and we have had their nominations string on for a period of time occasionally. We have created special positions, consultants to someone, so they might have an income while they are waiting for that confirmation. You have known of similar circumstances, have you not?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. That request then did not seem unusual?

Ms. CORNELIUS. No, sir.

Senator STEVENS. You had a time when you waited for a while, didn't you?

Ms. CORNELIUS. Yes, sir, I did. In fact, when it was first mentioned, Dr. Devine and I talked about the fact that I had been at OPM as a consultant prior to my confirmation.

Senator STEVENS. To my knowledge over a period of some 30 years in Government, I think it has happened as routine, and you treated that as a routine matter that day, did you not?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. Are the papers my assistants just gave you the ones you signed that day?

Ms. CORNELIUS. No, sir, this is not what I signed. This is one that Dr. Devine signed. This is a Position Description that he had signed.[1]

Senator EAGLETON. Description designing his own position signed by Dr. Devine, not signed by you?

Ms. CORNELIUS. No, sir, it is not signed by me.

Senator EAGLETON. We have another one here. It is on its way. There were a series of papers there that day, were there not?

Ms. CORNELIUS. Yes, sir, this one was the Request for Personnel Action. This one is the one that I signed.[2]

Senator STEVENS. What further happened with regard to that position you created, can you tell us?

Ms. CORNELIUS. It went into effect that day, the position as the Executive Assistant, and we started operating under that measure from that day on until April 30.

Senator STEVENS. What did you do with those papers that you signed that day?

Ms. CORNELIUS I signed them at Dr. Devine's desk and left them there. I didn't take them.

Senator STEVENS. Did you discuss this with the general counsel or have anything to do with the preparation of the papers at all?

Ms. CORNELIUS. No, sir, I did not have a conversation with the general counsel about the legality of the arrangement until later.

Senator STEVENS. And Dr. Devine was still the Director at that time, was he not?

Ms. CORNELIUS. Yes, sir, this was his last day as the Director.

Senator STEVENS. Did you have any discussions with Dr. Devine that this kind of problem might occur when it appeared there would be a delay in the Senate's confirmation of his nomination for a second term?

Ms. CORNELIUS. Subsequently we had a conversation about the problems it could create and was creating——

Senator STEVENS. I meant prior to the time you signed this, had you discussed this possibility?

Ms. CORNELIUS. No, sir.

Senator STEVENS. Did you discuss the document that you signed with the general counsel after the date you signed it and before the time when you discovered there was a delegation of authority involved?

Ms. Cornelius. No, sir, I did not.

Senator STEVENS. Did you discuss with Dr. Devine the authorities of this Executive Assistant position prior to the expiration of his first term?

Ms. CORNELIUS. No, sir, I did not.

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[1] See p. 499, item 1.

[2] See p. 501, item 2.

Senator STEVENS. Can you tell the committee, when did you discover there had been delegations of authority that had been signed by Dr. Devine that affected this position of Executive Assistant to you as the Deputy Director?

Ms. CORNELIUS. It was on April 29.

Senator STEVENS. And how did you happen to discover that?

Ms. CORNELIUS. I asked the general counsel to come to my office to talk to me about the legality of the arrangement that had been set up with Dr. Devine as the Executive Assistant.

Senator STEVENS. What led you to do that?

Ms. CORNELIUS. There were several packages that were moving back and forth through the office. The arrangement was set up where Dr. Devine would make a recommendation, as many other executives in the organization do before the package goes to the Director, the Acting Director, the Deputy Director, whomever is to sign it, and there were some packages that we were moving back and forth that I had recommendations on that I disagreed with and I was holding a couple of those in my office and it was at that time that I decided to ask the general counsel to tell me what the legal arrangements were.

Senator STEVENS. By packages, you mean sets of documents that required approval of the Director or Acting Director?

Ms. CORNELIUS. Right.

Senator STEVENS. Tell us what happened when the general counsel came to your office.

Ms. CORNELIUS. The general counsel came to my office and I asked him to please explain to me the arrangements that had been made with Dr. Devine as my Executive Assistant and to go over it for me on what the legal arrangements and implications were, and it was at that time during that conversation that I determined that there was another document that I had not seen.

Senator STEVENS. What was this document?

Ms. CORNELIUS. It was the delegation of authority.

Senator STEVENS. When did you first see that?

Ms. CORNELIUS. I first saw that the following day.

Senator STEVENS. Had you looked through the files regarding this Executive Assistant position prior to seeking advice of the general counsel?

Ms. CORNELIUS. No, sir, after I talked with the general counsel, then I asked to see the file that had the documents in it.

Senator STEVENS. The file——

Ms. CORNELIUS [interposing]. A personnel file.

Senator STEVENS [continuing]. Related to the position that was created, Executive Assistant to the Director?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. Was there a delegation of authority in that file?

Ms. CORNELIUS. No, sir, there was not.

Senator STEVENS. Where would such a delegation normally be, would it normally go to such a file?

Ms. CORNELIUS. I would think so, but I'm not certain.

Senator STEVENS. You said you saw it the next day.

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. And where did you see it?

Ms. CORNELIUS. I asked Mr. Hunt, because it had been indicated to me that Mr. Hunt had a copy in his file, in his safe.

Senator STEVENS. Who indicated that to you?

Ms. CORNELIUS. Dr. Devine.

Senator STEVENS. Did you have a conversation with Dr. Devine after you had talked to the general counsel?

Ms. CORNELIUS. Yes, sir, I did; that evening Dr. Devine and I spoke.

Senator STEVENS. That was the evening after you had talked to the general counsel?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. Could you tell us about that conversation?

Ms. CORNELIUS. Dr. Devine called me to his office and said that he had had a meeting with Mr. Tuttle, White House personnel, and that he was not going to be confirmed. It could be as late as August. And we had a discussion at that time about the arrangements we had; that they would not work that long. And he told me that Mr. Morris had indicated to him that I had been asking for a clarification on the legal aspects of the roles we had in the agency, and I told him that I had. And it was at that time that he told me about the delegation and that he had intended to share it with me and just had forgotten about it.

Senator STEVENS. Let me send you a copy of this March 25 delegation. Dr. Cornelius, is this the delegation of authority?

Ms. CORNELIUS. Yes, sir, it is.[3]

Senator STEVENS. When did you first see that?

Ms. CORNELIUS. I first saw that on the morning of the following day, April 30.

Senator STEVENS. This was delegation of authority from William Hunt, Associate Director for Administration, to Donald J. Devine, Director, dated March 25. It says, "This memorandum proposes an amendment to the Administrative Manual, page 12-09, Section 2, Authorities, part 12.202, Delegations. The amendment adds the following new paragraphs at the end of part 12.202, Delegations:

"The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified—unless specifically revoked by the Director—when the position of Executive Assistant to the Director is encumbered as follows:

"All investments and delegations of authrority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion.

"I recommend that you approve the proposed amendment."

Indicated approved, Donald J. Devine, Director, March 25, 1985. Is that what you have in front of you?

Ms. CORNELIUS. Yes, sir, it is.

Senator STEVENS. Do you have a copy of that, Senator Cochran.

Senator COCHRAN. Yes, I do.

Senator EAGLETON. Are all these exhibits going into the record?

Senator STEVENS. They are going into the record as we are proceeding here.

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[3] See p. 502, item 3.

Senator STEVENS. Is that the first time you had seen that?

Ms. CORNELIUS. Yes, sir, on April 30.

Senator STEVENS. Did you seek advice from the general counsel as to what the effect of that was on your authority as the Acting Director?

Ms. CORNELIUS. No, sir, I did not.

Senator STEVENS. Did you know?

Ms. CORNELIUS. No, sir, I only assumed in reading it that it meant my authority had been delegated.

Senator STEVENS. The authority of the Director had been delegated to the position of Executive Assistant to the Director on the last day of his first term?

Ms. CORNELIUS. Yes, sir, that's what I assumed.

Senator STEVENS. And you became the Acting Director the next day?

Ms. CORNELIUS. Yes, sir, I did.

Senator STEVENS. And Dr. Devine became your Executive Assistant on that day?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. Did you discuss this relationship to Dr. Devine after you read this delegation of authority?

Ms. CORNELIUS. Dr. Devine and I had the discussion on the night that we talked about it and he told me that there was a delegation. He said he did not have a copy of it, that Mr. Hunt was holding it, and we talked about what it said and how it delegated the authority to the Executive Assistant and at that time, we talked about how damaging that could be during his confirmation.

Senator STEVENS. The yellow light means I have 1 minute. Senator Eagleton and I agreed we are going to divide the time on either side on a 15-minute basis, as I indicated. So I will be back. Senator Eagleton?

Senator EAGLETON. You talked at that meeting on April 29 about how damaging this would be to Dr. Devine's nomination, is that correct?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. This was in Dr. Devine's office?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. Dr. Devine's term expired on March 25?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. Did he surrender his office, the office of the Director, the physical office, did he surrender that?

Ms. CORNELIUS. No, sir.

Senator EAGLETON. Did he keep all of his secretaries and staff?

Ms. CORNELIUS. As far as I know.

Senator EAGLETON. Did he keep his car and chauffeur limousine, and driver?

Ms. CORNELIUS. I don't know.

Senator EAGLETON. Did a car and driver go to you as Acting Director?

Ms. CORNELIUS. As Deputy Director I had a car and driver all along.

Senator EAGLETON. Did you get Devine's car and his driver?

Ms. CORNELIUS. No, sir, I did not.

Senator **Eagleton**. The record will later show he kept his car and driver. Did he keep his political appointees, Pat Korten and Mark Tapscott?

Ms. **Cornelius**. Yes, sir, he did.

Senator **Eagleton**. They since left the service since Dr. Devine has resigned as your Executive Assistant?

Ms. **Cornelius**. No, sir.

Senator **Eagleton**. Tapscott and Korten are still there.

Ms. **Cornelius**. They are still employees.

Senator **Eagleton**. The men in Devine's office and Devine told you that he had intended to share this document with you but had forgotten to do so?

Ms. **Cornelius**. That's correct.

Senator **Eagleton**. So from March 25 to April 29, well over a month, while you were the Acting Director of OPM and Donald Devine was your assistant, he had forgotten to share with you that he had delegated on his last day all of the authority of the agency to himself, Donald Devine, is that correct?

Ms. **Cornelius**. That's correct.

Senator **Eagleton**. What was the nature of this conversation about how damaging this would be to Mr. Devine's nomination? Who brought up damage?

Ms. **Cornelius**. It was a comment that was made by Dr. Devine during our conversation and he asked me if I didn't know or couldn't I say I knew about the document.

Senator **Eagleton**. You are a very forthcoming and honest witness. We appreciate that.

Did Dr. Devine ask you to keep this sort of quiet? Not to make a big to-do about it?

Ms. **Cornelius**. When I left his office that evening, he asked me what I was going to do, and I told him I was getting on an airplane at 7:45 the next morning and I just prayed to God no one asked me a direct question because if they did, I would have to give a direct answer.

Senator **Eagleton**. What was his rejoinder to that statement?

Ms. **Cornelius**. It was as I was leaving the office so there was no comment.

Senator **Eagleton**. The next day you went to Mr. Morris, April 30?

Ms. **Cornelius**. My plane was grounded the next morning. The previous evening after I had gotten home I called one of my assistants and told her that there was a document that Mr. Hunt had in his safe that I needed a copy of and wanted faxed to me in California.

Senator **Eagleton**. This meeting with Devine was at night, it was after working hours?

Ms. **Cornelius**. Yes, I think it was over after 6 o'clock, somewhere between 5 and 7 o'clock.

Senator **Eagleton**. So it wasn't easy to get ahold of Mr. Hunt to get the document at that time on the night of April 29?

Ms. **Cornelius**. No, sir, I didn't ask Mr. Hunt for the document.

Senator **Eagleton**. But the next day you asked one of your assistants in whom you had confidence to get a copy of the document from Mr. Hunt?

Ms. Cornelius. That evening I called her at home and asked her to get a copy of the document for me.

Senator Eagleton. Did you get the document?

Ms. Cornelius. The next morning the plane was grounded, I missed my connection. Instead of going on the trip, I went back to my office in Washington and that's when I got a copy of the document.

Senator Eagleton. Did you call in Mr. Hunt?

Ms. Cornelius. Mr. Hunt brought me the folder. My assistant had gone to Mr. Hunt for the document, he told me he would furnish it.

Senator Eagleton. Mr. Hunt brought you the folder with the delegation that has already been put in the record?

Ms. Cornelius. Yes, sir.

Senator Eagleton. Did you discuss it with Mr. Hunt?

Ms. Cornelius. No, sir.

Senator Eagleton. Well, didn't you ask Mr. Hunt whether he approved it or signed it?

Ms. Cornelius. No, sir; he handed it to me in a manila folder and he handed me this document and the only exchange we had was he said, I thought you knew about this.

Senator Eagleton. The record will show in examining the document that it was not signed or initialed by Mr. Hunt, but we will get into that later with Mr. Hunt. Was it then that you called in Mr. Morris, the general counsel?

Ms. Cornelius. No, sir; I only had the one conversation with Mr. Morris. I did not talk with Mr. Morris after I saw the document.

Senator Eagleton. Mr. Morris was appointed general counsel by Dr. Devine, right?

Ms. Cornelius. Yes, sir.

Senator Eagleton. They were long-time friends dating back to 1972?

Ms. Cornelius. I don't know, sir.

Senator Eagleton. Mr. Morris was a good friend of Dr. Devine's?

Ms. Cornelius. I do not know. He was the general counsel. I don't know what the personal relationship is.

Senator Eagleton. So on April 30 you saw the document and you saw that all of your authority had been unbeknownst to you delegated away by Donald Devine in the last day he was in office to Donald Devine, your Executive Assistant. Did you find that situation untenable?

Ms. Cornelius. Yes, sir.

Senator Eagleton. And you had to act to rectify it?

Ms. Cornelius. Yes, sir.

Senator Eagleton. What action did you take to rectify this untenable situation?

Ms. Cornelius. I wrote a memo to Dr. Devine abolishing the position of Executive Assistant to the Director.

Senator Eagleton. And did you just send it over to his office or did you call him and tell him it was coming? What communication was there between you and Dr. Devine about this abolition of his Executive Assistant office?

Ms. Cornelius. I walked down to Dr. Devine's office and took the memo to him.

Senator **Eagleton**. What did he say? Did you hand it to him personally?

Ms. **Cornelius**. Yes, sir, I did.

Senator **Eagleton**. What did he say?

Ms. **Cornelius**. He said we need to talk about this, you can't do this.

Senator **Eagleton**. And did you all talk about it?

Ms. **Cornelius**. I told him that I had thought about it most of the night and that it was my decision and that I had the authority to do it and that is the way I had decided to deal with the situation.

Senator **Eagleton**. What did he say?

Ms. **Cornelius**. He just said no, we need to talk about this, you can't do this, and we exchanged a few words and I left the office.

Senator **Eagleton**. Were the words in any sense heated?

Ms. **Cornelius**. No, sir.

Senator **Eagleton**. But you signed this memo? Would you have a member of your staff submit to us as promptly as possible, and if the member is here, get us a copy of this memo of discharge or abolition?

Ms. **Cornelius**. That memo was torn in two.

Senator **Eagleton**. Oh, it was torn in two?

Ms. **Cornelius**. Yes, sir.

Senator **Eagleton**. By whom?

Ms. **Cornelius**. By me when Dr. Devine gave me a copy of his resignation.

Senator **Eagleton**. Oh. Torn in two and thrown in the waste can? We don't have it?

Ms. **Cornelius**. No, sir, I do not have it.

Senator **Eagleton**. When did Dr. Devine give you a copy of his resignation, was it at that same meeting or another meeting?

Ms. **Cornelius**. No, sir, it was at a meeting later in the day.

Senator **Eagleton**. Later in the day. Tell us about that. He came to you or again did you go down to his office?

Ms. **Cornelius**. He came to my office later in the day and we talked for about 45 minutes, I believe. And he suggested that I consider letting him resign.

Senator **Eagleton**. And in this 45-minute talk you thought that all in all it would be a good thing to do?

Ms. **Cornelius**. It wasn't decided during that conversation. We talked about several things during that conversation. That was one of the things we talked about as well as the extension of the timeframe because I had abolished the position effective the close of business that day.

Senator **Eagleton**. But you ripped that, hadn't you?

Ms. **Cornelius**. I had not then, no, no. I had not then. I had that document. We talked and he went back to his office and later that afternoon around, I don't know, maybe 5 o'clock, I called down to his office to tell him that I would destroy the memo that I had given him if he in turn would give me a memo resigning effective Friday. This was on a Tuesday. He had asked for additional time in one of our earlier conversations that afternoon.

Senator **Eagleton**. This was Tuesday the 30th. He wanted time until Friday, whatever that would be.

Ms. CORNELIUS. I think it was May 3.

Senator EAGLETON. Go ahead.

Ms. CORNELIUS. He was interrupted by a phone call and he took the phone call and he asked me if I had talked to Mr. Tuttle at the White House and if that was his recommendation.

Senator EAGLETON. If that was his what?

Ms. CORNELIUS. If that was his recommendation.

Senator EAGLETON. Did you talk to Mr. Tuttle at the White House?

Ms. CORNELIUS. And I told him no, it was a decision that I had made. So he took the phone call and he came down to my office later and he was carrying a piece of paper, and he handed it to me and it was a leave of absence. And we discussed it and I said no, the condition under which I would destroy the original memo is that I have a resignation. We were interrupted by several phone calls and he went back to his office, I think twice—I'm not sure—to take phone calls. Then when he came back the last time he brought me a copy of his resignation.

Senator EAGLETON. Effective immediately or Friday, May 2 or 3.

Ms. CORNELIUS. I'm sorry?

Senator EAGLETON. Was the resignation effective immediately or Friday?

Ms. CORNELIUS. It was effective this date and it was dated May 3.

Senator EAGLETON. Did you at any time talk to anybody at the White House about this memo?

Ms. CORNELIUS. I received a call from Mr. Tuttle, the White House personnel office, after Dr. Devine and I had our first conversation around 2:30 in the afternoon when I took the memo down, and then Dr. Devine and I had a conference call with Mr. Tuttle a few minutes after I had the conversation.

Senator EAGLETON. What date would that be?

Ms. CORNELIUS. This is all the same day, April 30.

Senator EAGLETON. You had a one-on-one call with Tuttle yourself and then later a conference call, you, Devine and Tuttle?

Ms. CORNELIUS. Yes, sir. And then Dr. Devine hung up and Mr. Tuttle and I talked.

Senator EAGLETON. In another call with you and Tuttle?

Ms. CORNELIUS. We continued the conversation after the conference call.

Senator EAGLETON. Did Tuttle ask you to keep Devine?

Ms. CORNELIUS. He asked me if we could work out some arrangement.

Senator EAGLETON. Is that the gist of what he asked of all these various conversations you had with him, a one-on-one, a conference and then a one-on-one?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. Wanted you to work something out?

Ms. CORNELIUS. Yes.

Senator EAGLETON. In the end for Devine to be retained?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. And you said no, or what did you tell Mr. Tuttle?

Ms. CORNELIUS. I told Mr. Tuttle that I had made the decision and that that was not something I wanted to consider.

Senator EAGLETON. And Devine had to go?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. Dr. Cornelius, are you aware that there was an earlier delegation of authority drafted at OPM that was even broader, if that's conceivable, than the one that has been put in the record?

Ms. CORNELIUS. No, sir, this is the only one I have seen.

Senator EAGLETON. I will just read the delegation in this earlier one and later we will ask Mr. Morris to identify it. "All delegations of authority from the Director or Deputy Director are withdrawn and transferred to the Executive Director who may, in turn, redelegate authority at his discretion."

Mr. Chairman, I ask this original delegation, and we will inquire as to what happened to it, be placed in the record at this point.

Senator STEVENS. Just so we make certain that the record is clear, this is the one that was not signed.

Senator EAGLETON. This is the one that is not signed.

Senator STEVENS. Do you have a copy of it?

Ms. CORNELIUS. No, sir.

Senator STEVENS. Do you want to get a copy down to her?

Senator EAGLETON. We will call that for reference purposes the original but unsigned delegation.[1] Have you ever seen that before, Dr. Cornelius?

Ms. CORNELIUS. When I asked for the file from Mr. Hunt, there was a folder and there were some other papers in there. I did not read them, Senator. This very well could have been one.

Senator EAGLETON. That is in the record now. Keep it there. We will ask Mr. Morris about it.

The signed delegation, the one which you heard about on April 29 and saw for the first time on April 30, was that printed in the Federal Register, to your knowledge?

Ms. CORNELIUS. No, sir, I don't believe it was.

Senator EAGLETON. Was it printed in what is called the OGC Index Digest?

Ms. CORNELIUS. I believe I received a memo later that it had been published there after this happened.

Senator EAGLETON. After all of the events hit the fan; but prior to April 29, was it printed in the OGC Index Digest, to your knowledge?

Ms. CORNELIUS. Not to my knowledge, sir.

Senator EAGLETON. What is the OGC Index Digest?

Ms. CORNELIUS. I can assume it is the Office of General Counsel.

Senator EAGLETON. Are you aware that under the Freedom of Information Act, a purported attempt or pseudo-delegation of authority, whatever it might be labeled, under the law, under the Freedom of Information Act, is required to be printed in the OGC Index Digest contemporaneously with the transfer, not a month later?

Ms. CORNELIUS. No, sir, I was not aware of that.

Senator EAGLETON. We will get into that with somebody else. Are you aware that Mr. Morris, the day that all of this became public, then had it printed in the OGC Index Digest on May 3, 1985?

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[1] See p. 503, item 4.

Ms. **Cornelius**. That is the memo I remember seeing subsequently.

Senator **Eagleton**. It wasn't there on March 26, so Mr. Morris had it printed after he and Devine got caught and then made it public on May 3. You hadn't seen it in any printed form prior to that April 30 meeting, had you?

Ms. **Cornelius**. No, sir, I had not.

Senator **Eagleton**. My time is up.

Senator **Stevens**. Thank you very much.

Senator **Eagleton**. Could I put in the record the Morris directive printing for the first time the delegation of authority in the OGC Index Digest on May 3, 1985? [1]

Senator **Stevens**. Yes.

And I want to thank you for your courtesy in proceeding with Dr. Cornelius. I think it would be best for the purpose of understanding this record if we do it this way and then if you have any questions for either Mr. Morris or Mr. Hunt, we will proceed again with them, if that is agreeable.

Senator Cochran, do you have any questions you would like to pursue now?

Senator **Cochran**. Mr. Chairman, what I hope to do is ask some questions of Dr. Cornelius, but I would prefer you finish your line of questions with the witness, so I will defer my questions and yield to you, Mr. Chairman, at this point.

Senator **Stevens**. Thank you very much.

What did you do with that delegation of authority after you first obtained it, the one that delegated powers of the Director to the Executive Assistant to the Director?

Ms. **Cornelius**. I called Mr. Hunt to my office and had that abolished and set up a new delegation of authority.

Senator **Stevens**. Do you have a copy of that, Mr. Hunt?

Mr. **Hunt**. Yes.

Senator **Stevens**. Would you like to give Dr. Cornelius a copy? We can have copies of it made once you finish. Is that what you are talking about now?

Ms. **Cornelius**. Yes, sir, this is one dated May 1.[2]

Senator **Stevens**. Will you deliver that to one of our staff so we can have copies made and give the original back to her, please.

Let me ask you about another item while we are waiting, and that is the Position Description for the Executive Assistant to the Director which was signed by Dr. Devine on March 25. Let me send that to you just to make sure we are talking about the same thing, please. I think this is what you called a 52, is that right?

Ms. **Cornelius**. Yes, sir. This is the copy you gave me earlier that Dr. Devine signed.

Senator **Stevens**. I want to make sure we are talking about the same one. Attached to this one, though, is a second page.

Ms. **Cornelius**. Yes, sir.

Senator **Stevens**. What is that?

Ms. **Cornelius**. It is a Position Description for the Executive Assistant.

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[1] See p. 504, item 5.

[2] See p. 505, item 6.

Senator STEVENS. Did you approve that?

Ms. CORNELIUS. I read this Position Description the day I signed the form 52 empowering Dr. Devine in that position.

Senator STEVENS. Did you prepare it?

Ms. CORNELIUS. No, sir, I did not.

Senator STEVENS. Following the discovery of this delegation of authority, did you ascertain what actions had been taken on the record by Dr. Devine as Executive Assistant pursuant to the delegation? What did he do?

Ms. CORNELIUS. With documents that he had signed?

Senator STEVENS. Yes. I just ask you, did you try to find out?

Ms. CORNELIUS. No, sir. I asked what documents had gone through that I had not seen, and it was approximately at the same time we started getting the requests from the committee for that kind of information, and that is when I saw specifically.

Senator STEVENS. Did you already have an assistant as the Deputy?

Ms. CORNELIUS. Yes, sir, I have an assistant.

Senator STEVENS. When you became Acting Director, how did those packages get to you? Did they go through your assistant after Dr. Devine had seen them, or did they go to your assistant and then to you and then Dr. Devine? Can you tell us what was the paper trail there at the time?

Ms. CORNELIUS. The packages went to Dr. Devine, then they went to my assistant and then to me.

Senator STEVENS. What happened to them if you didn't approve them?

Ms. CORNELIUS. On some occasions they went back and were changed, and on some occasions they went back into the system and did not come back.

Senator STEVENS. Do you have any indication that any of them you would not approve were approved and sent into the system without your knowledge?

Ms. CORNELIUS. No, sir.

Senator STEVENS. Let me go to this document you have given us dated May 1, a series of documents. One of them is concerning the Executive Assistant to the Director position. That was from you directing Mr. Hunt to prepare the documents to abolish the position of Executive Assistant as of close of business Friday, May 3?

Ms. CORNELIUS. That's correct.

Senator STEVENS. "All internal delegations that relate to the position of Executive Assistant to the Director are revoked immediately," right?

Ms. CORNELIUS. Correct.

Senator STEVENS. Then on May 1, the OPM line of succession memorandum that substituted five positions for the line of succession after the Director: the Deputy Director, the Associate Director for Administration, the Associate Director for Compensation, the Associate Director for Compliance and Investigations, and the Regional Director, Chicago Region. That line of succession was changed on May 1, is that right?[1]

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[1] See p. 506, item 7.

Ms. CORNELIUS. That's correct.

Senator STEVENS. In doing that, you intended to eliminate the Executive Assistant to the Director's authority, is that right?

Ms. CORNELIUS. That's right.

Senator STEVENS. You also changed the previous succession, didn't you?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. How did that happen?

Ms. CORNELIUS. There were 10 in line of succession, and I asked if it was a requirement to have 10, and when they told me it was not, then I just stopped at 5.

Senator STEVENS. When Dr. Devine had signed his delegation of authority, in effect, he put the Executive Assistant to the Director after the Deputy Director in line of succession, right? [1]

Ms. CORNELIUS. That's correct.

Senator STEVENS. The other document is the document I think Senator Eagleton mentioned, which is dated May 3, from the Associate Director for Administration, Mr. Hunt, directing that the document be printed in the OGC Index Digest.

Senator EAGLETON. Two documents, Mr. Chairman—clarification—dated May 3. Mr. Morris printed on May 3 both the delegation of authority and then the revocation of it simultaneously. He had them printed May 3. The first document was 5 weeks, 6 weeks delinquent. This one you have is the revocation.

Senator STEVENS. No; this document here is the direction from Mr. Hunt to Mr. Morris directing him to have that printed.

Senator EAGLETON. And then the next one is the revocation there. They were all printed May 3, giving the delegation and taking it away, all printed May 3 after it became public.

Senator STEVENS. I just want to make sure the part of the record I have control of is the way I want it. That is, this document which you just looked at is from Mr. Hunt to Mr. Morris directing Mr. Morris to publish this document in the OGC Index? [2]

Ms. CORNELIUS. Yes, sir, that is to publish the delegation of the five that I had written up on May 1.

Senator STEVENS. But this is to publish the revocation of the prior delegation of authority and the new line of succession for the position of authority in OPM which you had changed when you abolished that previous delegation, right?

Ms. CORNELIUS. That's correct.

Senator STEVENS. I am sort of at a way station here. Again, I want to go back to Senator Cochran to see if he has any questions he wants to ask because I would go into a new line of questioning which would involve Mr. Morris and Mr. Hunt now. I want to make sure you have an opportunity to ask the questions you want of Dr. Cornelius, Senator.

Senator COCHRAN. Thank you very much, Mr. Chairman. I will then ask some questions of the witness.

Dr. Cornelius, as I understand it, you actually signed a document that described the duties of Dr. Devine as the Executive Assistant, is that correct?

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[1] See p. 507, item 8.

[2] See p. 509, item 9.

Ms. CORNELIUS. I signed the document hiring him into that position.

Senator COCHRAN. Did you not also approve a document that described his duties as an Executive Assistant to you as Acting Director?

Ms. CORNELIUS. I saw the Position Description at the time I signed the 52, but the paper that outlines the duties does not have a signature block on it. I did see it at that time.

Senator COCHRAN. Did you in your capacity as Acting Director raise any objection to the description of the position that was created for Dr. Devine?

Ms. CORNELIUS. We discussed that it was a general broad description and that's about the extent of it.

Senator COCHRAN. As Acting Director, you were actually in charge of the Office of Personnel Management, were you not?

Ms. CORNELIUS. I felt that regardless of what was in this that I would have the final say as the Acting Director.

Senator COCHRAN. If you had had any objection to the description of the duties, you felt that you did have the power to change that description in any way that you saw fit, did you not?

Ms. CORNELIUS. That's correct.

Senator COCHRAN. And you made no changes in the description of the position, did you?

Ms. CORNELIUS. No, sir, I did not.

Senator COCHRAN. At any time while Dr. Devine was serving as Executive Assistant, did you make any change in the description of his duties as Executive Assistant?

Ms. CORNELIUS. No, sir.

Senator COCHRAN. As a matter of fact, during the time that he served as Executive Assistant, you actually were running the Office of Personnel Management, were you not?

Ms. CORNELIUS. I assumed that I was signing the official documents.

Senator COCHRAN. There were some occasions when Dr. Devine was called upon to perform functions in your behalf as Director, he presided at certain meetings, he carried out certain functions under your direction as Acting Director, did he not?

Ms. CORNELIUS. You are talking about after March 25?

Senator COCHRAN. After he became Executive Assistant.

Ms. CORNELIUS. After he became my Executive Assistant, he served in capacities and continued having some of the same meetings he had had as the Director.

Senator COCHRAN. Isn't it true, however, that you were in charge of the agency in that you were running the agency in terms of doing all of those duties that the Director would have done at least 80 to 90 percent of the time, were you not?

Ms. CORNELIUS. I was doing most of the jobs that I had done previously as the Deputy Director. I was signing documents now as the Acting Director, the official signature for the agency. That was what changed.

Senator COCHRAN. Isn't it true that you decided to challenge the arrangement after meeting and conversing with Congresswoman Pat Schroeder and that it was at her request and her urging and direction that you decided to confront those in authority in the administration with the arrangement at the Office of Personnel Management?

Ms. CORNELIUS. That is untrue.

Senator COCHRAN. Are you saying that you had no meetings to discuss this with her?

Ms. CORNELIUS. I had a meeting with Mrs. Schroeder but we did not discuss the delegations at OPM.

Senator COCHRAN. When did this meeting occur?

Ms. CORNELIUS. This meeting occurred on April 29.

Senator COCHRAN. Of 1985?

Ms. CORNELIUS. Yes, sir.

Senator COCHRAN. This was just a couple of days before your signing of these documents redescribing and listing new Associate Directors, basically reorganizing the Office of Personnel Management, isn't that correct?

Ms. CORNELIUS. No, sir, I did not reorganize. I changed no positions whatsoever except the line of succession.

Senator COCHRAN. You redefined the positions of Associate Directors, did you not?

Ms. CORNELIUS. No, sir, I did not.

Senator COCHRAN. Did you not just tell the chairman that you made a list of Associate Directors and you didn't make a list of 10, you made just 5 because you found out that it was not necessary to have 10.

Ms. CORNELIUS. That was a line of succession. It had nothing to do with their positions, other than if something happened and line of succession as each took over.

Senator COCHRAN. You withdrew the line of succession as Acting Director, did you not?

Ms. CORNELIUS. Yes, sir.

Senator COCHRAN. And this was done a few days after your meeting with Congresswoman Schroeder, was it not?

Ms. CORNELIUS. No, sir, it was done the day after I had the discussion with Dr. Devine on the delegation of authority.

Senator COCHRAN. My time is up, Mr. Chairman.

Senator STEVENS. Yes, thank you.

Senator EAGLETON. Let him pursue and conclude.

Senator STEVENS. Finish that question.

Senator COCHRAN. You met with Congresswoman Schroeder on April 29 and you executed the documents we are talking about on May 1. Are those dates correct?

Ms. CORNELIUS. Yes, sir.

Senator COCHRAN. I have no other questions at this time, Mr. Chairman.

Senator STEVENS. Thank you very much, Senator.

Senator Eagleton?

Senator EAGLETON. I am going to yield to Senator Gore, of course.

I ask unanimous consent that a letter from Congresswoman Schroeder be printed in the record at this point—at no time in the meeting was there discussion of the role of Dr. Devine. I also ask unanimous consent that a letter from Dr. Cornelius to the Washington Post dated May 6, 1985, which fully supports what Dr. Cornelius just testified to in response to the Senator from Mississippi's question.

[The letters referred to follow:]

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON CIVIL SERVICE,
Washington, DC, June 3, 1985.

Senator THOMAS F. EAGLETON,
United States Senate,
Washington, DC.

DEAR SENATOR EAGLETON: A number of inaccurate newspaper articles have appeared concerning my meeting of Monday, April 29 with Office of Personnel Management Acting Director Loretta Cornelius. I am writing to let you know what occurred.

My staff called the office of Ms. Cornelius during the week of April 22 to request that Ms. Cornelius come to my office for a courtesy meeting. The meeting was set for 1:30 p.m. on April 29. The meeting lasted approximately fifteen minutes and concerned the morale and quality of the Federal workforce. At no time during the meeting was there discussion of the role of Dr. Devine.

Please call me if you have any questions.

With kind regards,

Sincerely,

PATRICIA SCHROEDER, *Chairwoman.*

[From the Washington Post, May 6, 1985]

OPM AND CONGRESS

An article covering executive management within the U.S. Office of Personnel Management warrants some clarification ["Personnel Office Tangled by Infighting," Federal Report, May 3]. The account of what happened during my meeting with U.S. Rep. Patricia Schroeder was simply inaccurate.

The purely social visit initiated by Mrs. Schroeder lasted about 15 minutes. The visit bore absolutely no relationship to Donald Devine's subsequent resignation as my executive assistant. Mrs. Schroeder and I did not discuss policy matters nor who was in charge of OPM during our brief meeting. It was an amicable session, one that was intended to strengthen the relationship between OPM and one of its congressional oversight committees.

The reconfirmation matter is something that involves Dr. Devine and the Senate. My objective is to ensure that all of OPM's energies are focused on supporting the administration's initiatives and priorities in federal personnel management.

It is time to get on with meeting OPM's many responsibilities under the law. Nothing should divert the agency's employees from that goal. My job is to keep OPM on an even keel, to provide continuity.

I want to dedicate all of my energy to providing the leadership that the OPM employees need and deserve to do their jobs.

LORETTA CORNELIUS,
Acting Director,
U.S. Office of Personnel Management,
Washington.

Senator STEVENS. Senator Gore.

Senator GORE. Thank you very much, Mr. Chairman.

Dr. Cornelius, I find your appearance here and your demeanor and your responses to the questions very refreshing. The reason I use that word is that I have been here not very long but I have been in the House of Representatives before this. Every once in a while, somebody comes up as a witness and they are just completely straightforward and direct and courageous, and I appreciate that.

As I was listening to you, I was trying to recall a quotation which to me sort of summarizes your tenure thus far at OPM, and one of my assistants found it for me. Mark Twain spoke to the Young People's Society at the Green Point Presbyterian Church in Brooklyn on February 16, 1901, and gave them this advice: "Always do right. This will gratify some people and astonish the rest." [Laughter.]

A lot of people are astonished that you have simply done the right thing. I think it's great. You know, it clearly was an untenable situation that you were in and you just simply did the right thing. Some are gratified, and some are astonished.

Let me just briefly explore the activities and the formal actions of Dr. Devine after the delegation of authority and after your assumption of the position of Acting Director. A number of documents were signed and in his statement later on—I have read the written statement that Dr. Devine will present—the testimony appears to kind of minimize the documents that he signed during this period of time.

One of them is a letter to Mrs. Reagan, and so forth. One document that he does not mention that he signed after he left the position of Director was on April 17; he signed an extremely controversial proposed rule establishing an employee medical file system to manage medical records. Are you familiar with that proposed rule?

Ms. CORNELIUS. No, sir, I'm not.

Senator GORE. That would indicate to me that it was done without you being consulted, but if that is not the case, you can always give additional information for the record later on.

Ms. CORNELIUS. I don't recall.

Senator GORE. Fine. This advance notice on medical records is extremely controversial because many people believe it is so broadly written that it would allow information such as family counseling to be kept in an employee's file even though it is not job related. My purpose in this is not to debate the merits of the proposed rule but simply to point out that after Dr. Devine stepped down nominally as Director, he signed this document which you have no memory of on April 17 and ironically, he signed it as Donald Devine, Director, OPM, and on the very same day—I am advised by counsel that April 17 is the date on which it appeared in the Federal Register, so it may have been signed some time prior to that. In any event, on the day it appeared in the Federal Register with his signature as Director, Mr. Devine testified to the Investigations Subcommittee, and I quote, "I'm not even Director of OPM at this moment."

There are a number of other documents. He signed an intervention in a case before the Merit Systems Protection Board, a review memorandum on the Federal Prevailing Rate Advisory Committee, and then there are a number of other documents that appeared in the Federal Register during this period—and we will have to inquire as to the exact date that he signed them—but on April 29, the last one appeared on a Federal Employees Health and Counselling Program dealing with alcoholism and drug abuse. Were you familiar with that one?

Ms. CORNELIUS. No, sir, I don't recall it, but there are documents that could have been signed before his time expired since there is a time lag in getting them into a Federal Register.

Senator GORE. What is that time lag normally?

Ms. **Cornelius**. It could be 1 week to 10 days. It varies.

Senator **Gore**. My list was based upon the date it appeared in the Register and I had thought that was the date they were signed.

Senator **Eagleton**. One is as late as April 29. That is well more than 1 week or 10 days after March 26. Devine was signing things in the Register as late as April 29.

Senator **Gore**. I have the exact document. It is dated April 17, the document itself, and it is signed Donald Devine, Director. I ask unanimous consent to include this in the record, Mr. Chairman.

Senator **Stevens**. What is that, Senator?

Senator **Gore**. This is a document on publication of a proposed new system of records and amendment of existing system signed Donald Devine, Director, during the period after he had stepped down as Director.

Senator **Stevens**. Very well.

[The information referred to follows:]

[illegible]

Advance
COPY

Publication date APR 17 1985
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OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974; Publication of
a Proposed New System of Records and
an Amendment of an Existing System

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice; Publication of a proposed new system of records and an amendment of an existing system.

SUMMARY: This notice proposes the establishment of OPM/GOVT-10, Employees Medical File System Records, which is a new Government-wide system of records for Federal employee medical records retained by agencies on active civilian employees and in Federal Records Storage Centers for inactive employees. Because some of the records to be included in this new system are now included in OPM/GOVT-1, General Personnel Records, system, necessary amendments to that system's notice are also being proposed. Elsewhere in this issue are proposed rules pertaining to the records in the new system.

DATE: Comments must be received on or before (30 days from date of publication). The notice, including the routine uses, becomes effective on (60 days from date of publication) without further notice, unless comments necessitate otherwise.

ADDRESS: Send or deliver written comments to the Assistant Director for Workforce Information, Office of Personnel Management, Room 5415, 1900 E Street, NW, Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: William H. Lynch, Workforce Records Management Division, (202) 632-5433.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (hereafter referred to as "the Office") is proposing to establish a new Privacy Act system of records to cover employee medical records (manual, automated, microfilmed, or microfiched) maintained by agencies including employee on-the-job exposure and injury records (1) at the work site; (2) in agency dispensary, medical, health, or safety offices; and (3) in servicing personnel or other designated offices. Records included in this system are those created during the application for Federal employment process (when the individual is subsequently hired) and during the employee's career. These records are retained to ensure protection of employees' health and safety, as well as governmental interests, and to meet requirements of the Office, the Occupational Safety and Health Administration (OSHA), and the Office of Workers' Compensation Programs (OWCP).

This system does not include (1) patient records; i.e., those normally associated with treatment of individuals admitted to or who voluntarily seek treatment at a health care facility concerning matters not pertaining to a condition of employment or arising as a result of an on-the-job occurrence; (2) records created as a result of epidemiological research studies; or (3) case files; i.e., the files maintained by the Office (medical disqualification decisions and disability retirement files), OSHA (relating to unsafe/unhealthy work conditions), and the OWCP compensation claim files). However, in some instances these case files will contain medical records that are included in this system, and it is possible that the proposed system would continue to retain copies of them after the creation of such case files. Efforts will be made to ultimately prevent unnecessary duplication of records. In order to ensure Privacy Act coverage on a transition basis, these types of records are described as being part of the proposed system.

This proposal results from the recommendations made by an Interagency Task Group on Federal Employee Medical Records, February 1981. The Task Group was co-chaired by the Office and OSHA and was established to review what was widely agreed by agencies and employee representatives to be a widespread problem (i.e., the lack of consistent, Government-wide medical records management policy) and to make recommendations for the problem's solution. After 18 months of examination, including advice from agencies, labor organizations, and other interested public and private sector medical practitioners and records managers, the Task Group recommended that (1) agencies establish an Employee Medical Folder (EMF) as a permanent repository for the medical records of a Federal civilian employee; (2) the Office establish policies and regulations governing the control and disposition of such records, including guidance on access to and release of medical information; and (3) medical records accompany an active employee as he or she moves within an agency or to another agency and be stored along with his or her Official Personnel Folder (OPF) when no longer employed. With the concurrence and active participation of OSHA, OWCP, and the National Archives and Records Administration (NARA) as the Government's records manager, the Office's Director approved the establishment of the Employee Medical Records File System (EMFS) which includes an EMF.

It is essential that regularization of medical records management provide for the retention of records vital to the employee's and the Government's interests on a long-term basis, and provide protection of personal privacy and compliance with the Privacy Act. Additionally, agencies and interested parties must be provided with adequate guidance on how and when such sensitive personal records may be disclosed both to officials of the custodial agency as well as to others outside that agency.

Therefore, consistent with the Office's long-standing Privacy Act policy as approved by the Office of Management and Budget regarding the inclusion of those employee personnel records that are under the Office's direct management or necessary to enable the Office to exercise its legal oversight responsibilities, the Office proposes to establish this new system of records. This action, along with the issuance of minimally necessary regulations and Federal Personnel Manual guidance, will accomplish the Task Group's recommendations and will greatly improve medical records management and protection of personal privacy.

The Office believes that agencies, employees, and other interested parties will be better served and agency costs will be reduced by placing such records in a separate system of records because such a system (1) establishes minimum essential uniformity and standards in medical recordkeeping; (2) facilitates accuracy in the description of records to be maintained; (3) more clearly defines the purposes for which the records are retained; (4) ensures that records are disclosed within the custodial agency and under routine uses only for purposes for which they are maintained; and (5) specifically identifies records appropriate for long-term retention, thus enabling compliance with OSHA recordkeeping standards; and (6) provides a reduction in the volume of medical records now being unnecessarily retained. This notice also modifies the existing notice for OPM/GOVT-1, General Personnel Records, to remove from that system those medical records to be retained in the new system. These actions are considered subject to the provisions of the Privacy Act (5 U.S.C. 552a(o)) requiring advance notice to Congress and the Office of Management and Budget. A "Report on New Systems" has been filed, concurrent with this publication, with Congress and the Office of Management and Budget. Because the records will remain covered by either OPM/GOVT-1 or an agency-specific system during the advance notice period, no waiver of this 60-day period has been requested.

U. S. OFFICE OF PERSONNEL MANAGEMENT

Donald J. Devine
Director

Senator GORE. I have here a set of logs that appear to track the movement of significant documents through your office and that of Dr. Devine during the time when he was Executive Assistant to the Director. Are you familiar with those logs?

Ms. CORNELIUS. Yes, sir.

Senator GORE. Some of these records show actions taken only by Dr. Devine—23 to be precise. Does that mean he made the decision by himself on those matters?

Ms. CORNELIUS. I presume if I did not sign them.

Senator GORE. Another 8 show actions by you only and still others—15 have the notation "Return for L.C. signature block." Who did what in those cases?

Ms. CORNELIUS. We set up a form that was put on the top of each of the document packages where Dr. Devine could make a recommendation or notation on the individual packages before they came to me for final signature.

Senator GORE. Dr. Devine has provided the committee with a graph summarizing actions taken by him, by you and others during his tenure as Executive Assistant. Are you familiar with this graph?

Ms. CORNELIUS. No, sir.

Senator GORE. He says in effect that he just played a minor role and one consistent with the kind of role an assistant would play in any event. Maybe the staff could provide her—have you got it there?

Ms. CORNELIUS. We have a copy here.

Senator GORE. You can see his role is this small column there, and yours is this large column over here. Is that an accurate representation of what was going on during this period March 25 to the beginning of May?

Ms. CORNELIUS. I would assume so. I only assumed I saw the bulk of the packages going through. I know it did increase my involvement in them and signing more than I did as Deputy.

Senator GORE. The bulk of documents which have your signature are labeled "With Donald Devine review." Did you take his recommendation in those cases?

Ms. CORNELIUS. In some cases I took his recommendation and on others I did not.

Senator GORE. There were some on which you did not take his recommendation?

Ms. CORNELIUS. That is correct.

Senator GORE. Mr. Chairman, I have no further questions at this time. I would like to just thank the witness again.

Ms. CORNELIUS. You are welcome.

Senator EAGLETON. I yield on our 15 minutes to Senator Chiles.

Senator CHILES. No questions.

Senator STEVENS. Senator Mathias, we agreed we would split the time block 15 minutes on each side and they are still on the balance.

Senator MATHIAS. I have no questions at this time.

Senator EAGLETON. Senator Glenn.

Senator GLENN. I have no questions at this time.

Senator EAGLETON. Let's clarify, Dr. Cornelius, this last line of questioning with Senator Gore on the original round of questioning. You testified in essence as follows: These packages or paper trails would come through. A large number of the packages Devine said OK, you agreed, said OK and it became operative. There were some situations where Devine had said OK, you disagreed and your decision prevailed. But then there were a couple instances where Devine said yes, you said no, and the decision was still yes even though you were Acting Director. Isn't that what brought this document, the transfer of power document, to your attention on April 29?

Ms. CORNELIUS. I'm not aware that anything I said no on was signed out as yes by Dr. Devine, in fact.

Senator EAGLETON. OK. If things were running so smoothly, if your decisions were at all times prevailing in a smooth and effortless way, what brought it to a head on April 29?

Ms. CORNELIUS. There were documents there that I did not agree with the recommendation on and sometimes when I would send them back, they had not come back to me and I assumed they were being held.

Senator EAGLETON. Packages or documents were brought to your attention, you disagreed with a finding or recommendation, and then that's the last you heard of it?

Ms. CORNELIUS. On some of them, that is true.

Senator EAGLETON. They just sort of disappeared?

Ms. CORNELIUS. I don't know.

Senator EAGLETON. But it aroused your curiosity as Acting Director of a very important agency?

Ms. CORNELIUS. It did.

Senator EAGLETON. In essence, it was those documents that went off into the mist that says, hey, what gives here, am I the Acting Director of OPM, something went clickety-click in your mind?

Ms. CORNELIUS. That was one thing. The other was our requirement to have many hearings on many subjects during that timeframe. There was a question on whether it was legal or not for him to be testifying.

Senator EAGLETON. As what? What would he hold himself out to be when he was testifying?

Ms. CORNELIUS. There are numerous people in the agency who do testify and on occasions—I remember two at least—I asked Dr. Devine to do the testimony for OPM while I was the Acting Director.

Senator EAGLETON. But on or around April 29, to use an old cliche, you began to smell a rat, didn't you?

Ms. CORNELIUS. Well, when Dr. Devine told me it was going to be longer, this was supposed to be an interim arrangement for what we thought would be a very short period of time and I think he thought that would be a short period of time.

Senator EAGLETON. So around then he told you his nomination was in trouble and you were having difficulties, managerial difficulties, in terms of some of these documents disappearing and you began to wonder what was what. Did you ever ask yourself the question who's in charge here?

Ms. CORNELIUS. I think it is only human nature when someone has been in charge of an organization and they are still there in an interim capacity that people will normally turn to that individual. My only concern about that was from a legal point of view, what I was legally responsible for—my legal responsibility as a Senate-confirmed appointee.

Senator EAGLETON. A Senate-confirmed appointee and Acting Director under the law.

Ms. CORNELIUS. Yes.

Senator STEVENS. Thank you, Senator.

Senator Mathias, I still have some questions of Dr. Cornelius, but if you want to ask anyone else questions——

Senator MATHIAS. I have no questions at this time.

Senator STEVENS. Thank you.

Dr. Cornelius, you did visit with Congresswoman Schroeder prior to the time you had the meeting with Dr. Devine and Mr. Hunt, isn't that correct?

Ms. CORNELIUS. That is correct.

Senator STEVENS. What did you visit her about? How did that come about?

Ms. CORNELIUS. I had started receiving invitations from several people on the Hill to make courtesy visits. The request came as: "We don't know you, you have been in an acting capacity there for a month." Those were not my responsibilities as a Deputy Director so I did not know that many people on the Hill. There was an emphasis made on courtesy visits and before I went to visit Mrs. Schroeder, her office called to reconfirm and reiterate that it was strictly a courtesy visit.

Senator STEVENS. And what did you discuss with her?

Ms. CORNELIUS. We discussed the voting that day of the seating of the Congressman from Illinois, we discussed some of the morale of the Federal work force. It was a very light conversation. The entire visit didn't last 15 minutes.

Senator STEVENS. Did you discuss the role of Dr. Devine at the agency at that time?

Ms. CORNELIUS. No, sir.

Senator STEVENS. You became Acting Director and Dr. Devine was your Executive Assistant. Did you ever discuss with him at that time, at the time this relationship began, how policy issues were going to be handled and what your role would be, what his role would be?

Ms. CORNELIUS. No, sir, we did not have any discussion about that. The only discussion that occurred was at a meeting of the political employees at OPM on the routing of packages. The normal routing would be they would go to me as Deputy Director and I would put any comment on them I wanted and then they would go on to Dr. Devine. We reversed that and he made that announcement in a meeting.

Senator STEVENS. Did you have people here at the prior confirmation hearing that took place after you became Acting Director, did you have people report back to you the progress of the hearing? Were you here at that time?

Ms. CORNELIUS. Was I here at his prior confirmation hearing, the one in April?

Senator STEVENS. Yes.

Ms. CORNELIUS. Yes, sir, I was here.

Senator STEVENS. You were Acting Director that day, when you were here?

Ms. CORNELIUS. Yes, I became Acting Director on March 26.

Senator STEVENS. I am in the role of a prosecutor. I am not sure I want to have that role here. I want to ask you because it makes a great deal of difference to some of us. You indicated to Senator Eagleton that when you had that conversation with Dr. Devine after you had discovered this delegation of authority, there was a conversation concerning the existence of that delegation of authority and what Dr. Devine said to you then.

Are you focusing in on what I am talking about now, the time I am talking about?

Ms. CORNELIUS. The evening that I went down to Dr. Devine's office when he told me that the confirmation would probably take longer.

Senator STEVENS. I am talking about after you discovered the delegation of authority.

Ms. CORNELIUS. Yes, sir, we talked about it.

Senator STEVENS. At that time, did Dr. Devine ask you not to discuss this delegation of authority?

Ms. CORNELIUS. Yes, he asked me if I could say that I knew about it.

Senator STEVENS. He asked you if you could say you knew about it?

Ms. CORNELIUS. That I was aware it existed.

Senator STEVENS. Senator Cochran, do you have any questions?

Senator COCHRAN. Mr. Chairman, in connection with the, I called it a job description, but I think the technical term is Position Description that you gave me, I was asking you about the exact duties that would be performed by the Executive Assistant.

This Position Description was actually prepared by whom, you or Dr. Devine?

Ms. **Cornelius**. I don't know who prepared it.

Senator **Cochran**. But it was published or filed, put in the record, with your full knowledge and with your approval, was it not?

Ms. **Cornelius**. I read it. I read it when I signed the 52.

Senator **Cochran**. It contained a broad general description of powers to operate pretty much as the principal assistant to the Acting Director, did it not?

Ms. **Cornelius**. My understanding was it was patterned after executive assistant positions that were in the agency. I do not know.

Senator **Cochran**. Mr. Chairman, may we have that placed in the record? I don't know if it is in the record or not in the record. Could we be sure it is in the record.

Senator **Stevens**. We will be certain it is. I think it is already.[1]

Senator **Cochran**. The practical relationship, however, between you and the Executive Assistant, Dr. Devine, was that you reviewed and signed most of the documents as the Director in fact of the Office of Personnel Management while he was Executive Assistant, did you not?

Ms. **Cornelius**. I had the final signature authority.

Senator **Cochran**. And you exercised that authority, did you not?

Ms. **Cornelius**. Yes, sir, documents that came through my office, I exercised that authority.

Senator **Cochran**. I am not sure the extent to which Dr. Devine will describe the relationship when he testifies. I am sure that he will be questioned about that and we will have an opportunity to find out, in fact, what he did as the Executive Assistant and what you did. I think the suggestion here is that there was something improper or unusual in the relationship of a person who is the designee and awaiting confirmation to serve in such capacity, but the fact is persons serve in such positions regularly in the administration, do they not?

Ms. **Cornelius**. I think they serve in capacities similar to this, yes.

Senator **Cochran**. I think Under Secretary of Agriculture John Norton has been serving as an assistant at the Department of Agriculture awaiting confirmation as the No. 2 person at the Department of Agriculture. He is now confirmed but I know he served there for a time and would come to the Hill and carry out certain advisory functions with the Secretary of Agriculture. So that comes to mind immediately because that is something we have observed here recently—so it is not unusual, is it?

Ms. **Cornelius**. I don't think it is unusual to have someone serving while they are waiting confirmation.

Senator **Cochran**. Let me ask you this other question. To be sure I understand the dates, you talked about the meeting with Congresswoman Schroeder and you talked about meeting with General Counsel Morris to raise the question with him about the delegation of authority memorandum. Those meetings occurred on the same date, did they not; that is, April 29? You testified earlier that you met with him on that date, too?

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[1] See p. 499, item 1.

Ms. CORNELIUS. That's correct.

Senator COCHRAN. And that is the same date I think Senator Eagleton said you began to smell a rat, that was the date you had that meeting with Congresswoman Schroeder, was it not?

Ms. CORNELIUS. That was not the day I began to smell a rat. [Laughter.]

Senator COCHRAN. That was his testimony. You didn't correct him but you have an opportunity to now.

Ms. CORNELIUS. Thank you.

Senator COCHRAN. The fact of the matter is, that was the first day you brought up to Mr. Morris any question about a memorandum of delegation of authority, isn't that correct?

Ms. CORNELIUS. That is the day Mr. Morris and I had the discussion.

Senator COCHRAN. I have no other questions, Mr. Chairman.

Senator STEVENS. Senator Mathias?

Senator MATHIAS. I would just ask this question following on Senator Cochran's inquiries: You say it is not unusual for a Presidential nominee to serve in some capacity in the office to which he had been nominated, prior to Senate confirmation. Is that correct?

Ms. CORNELIUS. I believe that is correct. I don't know if it has been done by someone who is waiting for reconfirmation or not.

Senator MATHIAS. Would it be unusual for someone to exercise duties, the statutory duties of the office to which he has been nominated, prior to his confirmation and induction into office?

Ms. CORNELIUS. I believe it would be.

Senator MATHIAS. Thank you.

Senator STEVENS. I think I still have some time. I will go on to some other questions here.

Senator GORE. Mr. Chairman, before you do that, I wonder if I might briefly follow up on the two points that were just made. I don't have any other questions for this witness after that.

Senator STEVENS. Fine, all right, just for Dr. Cornelius.

Senator GORE. Yes, that's correct.

You testified in response to questions from Senator Cochran that in that meeting was the first day you brought up the memorandum of delegation of authority. Wasn't that the first day you found out about that delegation of authority?

Ms. CORNELIUS. That's correct.

Senator GORE. So you couldn't have brought it up before then because it was kept secret from you. I just wanted to make that point and one other briefly. That is, the statement was made that some are trying to imply there is something wrong or unusual about an appointee who has not yet been confirmed having a temporary job in an agency or even an executive assistant job. What was wrong and unusual was not that at all but this secret delegation of the legal authority to make the decisions as a Director even though you were supposed to be Acting Director. That's what was unusual. I just wanted to make those two points.

Thank you, Mr. Chairman.

Senator STEVENS. Thank you, Senator.

I would like to go to Mr. Hunt now, if I could. You may be a doctor. I don't know. [Laughter.]

Mr. HUNT. Not today.

Senator EAGLETON. I thought we were going to finish with Dr. Cornelius and then go to the other folks.

Senator STEVENS. I thought we had.

Senator LEVIN. I have one question of Dr. Cornelius, if I could.

Senator EAGLETON. I have some other questions.

Senator STEVENS. All right, start running their time, will you. [Laughter.]

Senator EAGLETON. I will take one moment.

Senator LEVIN. I just have one question. I am not in a hurry.

Senator EAGLETON. I yield to Senator Levin.

Senator LEVIN. Mr. Chairman, I just have one question. I have followed this story very closely. Dr. Cornelius, do you feel you should have been informed by Mr. Devine of the delegation?

Ms. CORNELIUS. Yes, sir.

Senator LEVIN. Did you tell him that?

Ms. CORNELIUS. Yes, sir.

Senator LEVIN. What was his answer?

Ms. CORNELIUS. He had intended to do it. He only thought this would be for a few days and he had just forgotten about it.

Senator LEVIN. Why do you feel you should have been informed?

Ms. CORNELIUS. Because I think it usurps the authority and the position.

Senator LEVIN. Thank you. Thank you, Mr. Chairman.

Senator STEVENS. Senator, let't get an agreement as to how long we are going to run here.

Senator EAGLETON. I think I can finish it on this round.

Senator STEVENS. I understand that. We are going to continue here, I think, for a few more minutes and then we will come back at 2 o'clock.

Senator EAGLETON. I want to finish with Dr. Cornelius.

Senator STEVENS. It will be in this room. We tried to find a bigger room. We will be back here at 2 o'clock this afternoon. You finish with Dr. Cornelius.

Senator EAGLETON. I think there is some confusion in Senator Cochran's mind about the issue before the committee. Senator Cochran refers to the job description of this instantly special assistant, whatever, to the Director. It is an innocuous nothing and it is a holding pattern for Devine and there is precedent. Previous administrations have thrown people into these slots. That is not the issue, and I ask unanimous consent to put these various innocuous job descriptions about Devine's special assistantship into the record so that Senator Cochran can read them.

Senator COCHRAN. I put them in the record already.

Senator EAGLETON. Did you read them before you put them in?

Senator COCHRAN. I read them before I put them in.

Senator EAGLETON. Did you read one of the people creating this is George Nesterczuk? Did you put that document in the record, Senator? And you remember who George Nesterczuk was?

I ask unanimous consent to put the Nesterczuk memo to Mary Rose about this emergency appointment for Devine in the record.[1] To refresh Senator Cochran, Nesterczuk was Larry Hogan's campaign manager for Governor and miraculously was back on the Federal payroll the day after the election was held, just by coincidence. Hogan went down the tube, old buddy Nesterczuk showed up and went back on the payroll and they just worked out that way.

Senator STEVENS. That is not unique either. [Laughter.]

Senator EAGLETON. They met election night at the Hogan headquarters, did a little crying—anyway, I will put the Nesterczuk memo in the record. Anyway we are not trying his special assistantship. We are not trying Pat Schroeder, although Senator Cochran would like to try Pat Schroeder. All we are trying to find out today is why Dr. Devine and Mr. Morris, the counsel, concocted this secret transferal of power on March 26, and kept it in the vault until it got hot on April 29. You know what also made it hot. Ms. Cornelius testified these documents were disappearing. This committee was looking into it. She also testified to that, that the committee was asking for documents and asking for things so she had to start asking some questions and then all of a sudden Morris starts to get straight with God [laughter] and it gets in the record on May 3.

All right, Ms. Cornelius, you said that at that meeting with Devine on the night of April 29, he asked you to say that you knew about the transference of authority?

Ms. CORNELIUS. No; he said, "Couldn't you say you knew about it."

Senator EAGLETON. That is after you told him you didn't know about it?

Ms. CORNELIUS. Yes, sir.

Senator EAGLETON. And he said, now, you just told me, Ms. Cornelius, that you don't know about it, couldn't you say that you did know about it—that is sort of the sequence in conversation with Devine.

Ms. CORNELIUS. That's correct.

Senator EAGLETON. So he was asking you to tell an untruth?

Ms. CORNELIUS. He asked me to say couldn't I know about it.

Senator EAGLETON. You made it clear to him you didn't know about it?

Ms. CORNELIUS. No, sir, he knew I didn't know about it.

Senator EAGLETON. Then later, to whom did you say I pray to God that I won't be asked because I would have to tell what has happened?

Ms. CORNELIUS. I said that to Dr. Devine as I left the office.

Senator EAGLETON. As you left that office. Now, there are various documents floating around in the record. Let's make sure we have in the record the ones that should be there and the ones that you knew about. We probed the delegation of authority memo and you first learned about that April 29.

Ms. CORNELIUS. That's correct.

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[1] See p. 510, item 10.

Senator EAGLETON. The change in line of succession, when did you first learn about that?

Ms. CORNELIUS. At the same time.

Senator EAGLETON. April 29. The Position Description that is the Cochran line of diverting inquiry——

Ms. CORNELIUS [interposing]. I saw the Position Description when I signed the 52 on March 25.

Senator EAGLETON. What the hell is this thing, the standard organizational terminology?

Senator COCHRAN. Double speak.

Senator EAGLETON. That was signed March 25. Have you seen that?

Ms. CORNELIUS. This just changes the titling. It permits the titling of that position.

Senator EAGLETON. That is this assistant position?

Ms. CORNELIUS. Assistant organizational titling.

Senator EAGLETON. Have you seen that before?

Ms. CORNELIUS. I think that was in the package the day I saw the delegation of authority. I believe this was in the package Mr. Hunt gave me when he gave me a copy of the delegation of authority.

Senator EAGLETON. We will put that in the record, too, Mr. Chairman.[1]

Senator STEVENS. Very well.

Senator EAGLETON. Hunt comes in with this package, right? We will hear from him in a minute. Did you ask why he, Mr. Hunt, hadn't told you about this delegation of authority?

Ms. CORNELIUS. Did I ask him?

Senator EAGLETON. Yes.

Ms. CORNELIUS. No, sir, I did not.

Senator EAGLETON. He had the package that had the smoking document in it?

Ms. CORNELIUS. But I didn't feel that it was his position to tell me so I didn't ask him.

Senator EAGLETON. Did you ever ask Mr. Morris why he didn't tell you, your general counsel?

Ms. CORNELIUS. No, sir, I did not.

Senator EAGLETON. His name and intials are over some of these documents. These are two of your higher-up associates at OPM, are they not?

Ms. CORNELIUS. That's true.

Senator EAGLETON. You have your own assistant or assistants directly accountable?

Ms. CORNELIUS. I have one assistant.

Senator EAGLETON. One assistant. But you did not feel inclined to ask Hunt what he knew and when he knew it nor Morris what he knew and when he knew it?

Ms. CORNELIUS. No, sir, I thought it better to ask the Director.

Senator EAGLETON. Were you informed by Mr. Morris that an SES emergency appointment—that is what Devine got on March 26, SES emergency appointment—required a written determination and that it could be made only to meet the bona fide, unanticipated urgent need?

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[1] See p. 511, item 11.

Ms. **Cornelius**. Mr. Morris and I did not have that discussion.

Senator **Eagleton**. Was he giving any legal advice about this appointment of Mr. Devine?

Ms. **Cornelius**. I recall us discussing the authority of the position. It was a very brief conversation.

Senator **Eagleton**. As Deputy, you had been there how many years?

Ms. **Cornelius**. Four.

Senator **Eagleton**. Were you aware of other emergency SES appointments during those 4 years?

Ms. **Cornelius**. I don't recall any.

Senator **Eagleton**. If any were made, were they made by Dr. Devine and not by you?

Ms. **Cornelius**. I don't know.

Senator **Eagleton**. But none were made by you?

Ms. **Cornelius**. No, sir.

Senator **Eagleton**. So this was the first emergency SES appointment that you were faced with?

Ms. **Cornelius**. As far as I knew.

Senator **Eagleton**. And if the law says that they require a written determination that they can be made only to meet "a bona fide, unanticipated, urgent need," that's what the law says. Morris didn't tell you that that is what the law says one way or the other?

Ms. **Cornelius**. I don't recall that being in our discussion.

Senator **Eagleton**. How urgent was, in your opinion, the Devine appointment on March 26? Was it urgent as far as the agency was concerned or was it urgent as far as Devine was concerned?

Ms. **Cornelius**. I thought it would be urgent for or advisable perhaps is a better word, or both.

Senator **Eagleton**. But you terminated it on May 3. Did you fill it after that?

Ms. **Cornelius**. No, sir, I did not fill it.

Senator **Eagleton**. So it was only urgent for about 5 weeks. You found no need to find a successor for Special Assistant Devine?

Ms. **Cornelius**. No, sir, I have not.

Senator **Gore**. Will the Senator yield?

Senator **Eagleton**. Yes, I will yield.

Senator **Gore**. In defense of Dr. Cornelius on that, that particular point, it does seem to me reasonable for her to assume early on that Dr. Devine would be confirmed and it was only slowly during this period that it began to appear as if the confirmation might not work out after all. So it seemed to me that it is reasonable for her to think, yes, this does seem like something that should be done quickly because there is just a glitch up on the Hill and he eventually will be confirmed; but then as the situation changed, it became apparent that position need not be filled. I didn't come here to defend you against my colleagues on this side, but I just wanted to make that clear.

Senator **Eagleton**. Dr. Cornelius, are you familiar with what is called the OPM Administrative Manual?

Ms. **Cornelius**. Yes, sir.

Senator EAGLETON. There is a section in that manual, 12.203, entitled "Submission," and it says that all changes in delegations are to be handled in a certain way and we will send that out to you.[1] It says when there are changes in delegation of authority, they are to immediately go to the Deputy Director of OPM. Isn't that interesting? That is, you were to be the first to get this when it comes out there. Did you ever get a written change in the delegation of the authority pursuant to section 12.203 of the OPM Administrative Manual?

Ms. CORNELIUS. No, sir.

Senator STEVENS. How many more questions are you going to have, Senator?

Senator EAGLETON. This will be about the end. Is Pat Korten still Executive Assistant Director for Policy and Communications?

Ms. CORNELIUS. Yes.

Senator EAGLETON. Mark Tapscott, Assistant Director for Public Affairs?

Ms. CORNELIUS. Yes, sir, but in Public Affairs on the same day, I think it was April 30—maybe May 1—I named Len Kill Kelley in an acting capacity in Public Affairs.

Senator EAGLETON. To be ahead of Mr. Tapscott, as it were?

Ms. CORNELIUS. Yes, sir, to be the spokesman for the agency with the media and to represent me.

Senator EAGLETON. And what do we do with Tapscott now?

Ms. CORNELIUS. Mr. Tapscott stayed and is working in a position back in Public Affairs.

Senator EAGLETON. Under this new gentleman?

Ms. CORNELIUS. Mr. Kill Kelley.

Senator EAGLETON. Why did you replace Mr. Tapscott with Mr. Kill Kelley?

Ms. CORNELIUS. Because I wanted someone to speak for me and the agency and Mr. Tapscott had worked for Dr. Devine and I felt that I would like to have someone that would represent me separately to the media.

Senator EAGLETON. Perfectly understandable. Now, do we still have on board these five that have been previously referred to as Devine commissars in the earlier hearing? Do we still have on board Joseph Root, Alan Wandling, Brian Carey, Patsy Ann Seawright, and Bertha Nelson?

Ms. CORNELIUS. I have not made any personnel changes, Senator.

Senator EAGLETON. Other then downgrading Tapscott——

Ms. CORNELIUS [interposing]. Mr. Tapscott was not downgraded. Mr. Kill Kelley was moved over in an acting capacity.

Senator EAGLETON. That is the only administrative change you made?

Ms. CORNELIUS. Yes, sir, that is.

Senator EAGLETON. That is all I have for this one.

Senator STEVENS. Just to close this up, Dr. Cornelius, you had every reason to believe during this continuum, at least in the beginning, that Dr. Devine would be reconfirmed, did you not?

Ms. CORNELIUS. Yes, sir, I did.

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[1] See p. 512, item 12.

Senator **Stevens**. And as the Acting Director that you were temporarily in that position, right?

Ms. **Cornelius**. That's correct.

Senator **Stevens**. Had he been confirmed by this time, he would have resumed the position of being your superior once more, is that right?

Ms. **Cornelius**. That is correct.

Senator **Stevens**. These two gentlemen that flank you there would be his advisers rather than yours, right?

Ms. **Cornelius**. That's correct.

Senator **Stevens**. So you were really, under the circumstances, tending the store as the statute intended you to do, right?

Ms. **Cornelius**. Yes, sir.

Senator **Stevens**. You are the Acting Director?

Ms. **Cornelius**. That's correct.

Senator **Stevens**. Have you changed offices?

Ms. **Cornelius**. No, sir, I have not.

Senator **Stevens**. And you have conducted yourself as a person who has the acting authority, realizing the time may come when Dr. Devine would resume the authority that was given him originally, correct?

Ms. **Cornelius**. That has been my intent.

Senator **Stevens**. I probably shouldn't testify this way. I want to tell you I served enough years downtown in an administration and I watched enough administrations to know that the documents you signed are routine. I can't remember anyone who was awaiting confirmation that we didn't work out some way for that person to get some compensation. This process we go through is not inhumane. Dr. Devine had a statutory compensation during the period he was waiting for confirmation. He had to have an income and, in my judgment, there was absolutely nothing wrong with creating the position. I want to tell you also that, in my judgment, what you have told us today indicates that your conduct as Deputy Director at OPM was as it should be.

Ms. **Cornelius**. Thank you.

Senator **Stevens**. We are proud of you that you have tried to observe what I would call the sanctity of the law that created these positions that both you and Dr. Devine occupy. On behalf of the committee, I thank——

Senator **Eagleton**. Mr. Chairman, I have some questions on OPM policies, which I would like to submit in writing to Dr. Cornelius for the record.

Senator **Stevens**. I don't see any problem with that.

Ms. **Cornelius**. That is fine.[1]

Senator **Stevens**. We are going to recess in just a minute and ask some questions——

Senator **Eagleton** [interposing]. And the answers.

Senator **Stevens**. And the answers when we return. You have to understand our friend and I have been around here long enough, we have sat beside each other too many times, so I understand what he is doing. [Laughter.]

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[1] See p. 595.

I just want to clarify your position for the balance of the hearing. You have business to do. I think we can proceed with Mr. Hunt and Mr. Morris without your being here. You can be here if you wish but we would like to have you available if we want to call you back before the hearing is over, all right?

Ms. CORNELIUS. Yes, sir.

Senator STEVENS. With that, gentlemen, we will stand in recess until 2 p.m.

[Whereupon, at 12:12 p.m., the meeting was recessed, to reconvene at 2 p.m. the same day.]

AFTER RECESS

Senator STEVENS. We will continue with the hearing. Dr. Cornelius, we are pleased to see you are here. I have some questions now for Mr. Hunt. We will proceed on the same basis this afternoon, and we will allocate time on the basis of 15 minutes on each side. Senator Eagleton and I will yield that time to members on our own side of the aisle in the event they wish to ask questions.

You were all sworn this morning, so you are still under oath so long as this hearing is going on.

Mr. Hunt, did you draft the delegation of authority that is in question in this hearing?

Mr. HUNT. I did not draft the text of the language that is reflected in the document presented here this morning.

Senator STEVENS. Was it prepared in your office?

Mr. HUNT. It was the text of the actual delegation along with the other documents, as well as the original job description for an Executive Director. It was delivered to me sometime the week before the expiration of Dr. Devine's first term by the general counsel. This followed a session with Dr. Devine where he mentioned to me that Ms. Cornelius had agreed to establish a position in OPM to accommodate him should his term expire, as it was expected, I think, at that time the nomination process would not be concluded, and she agreed to do that. He mentioned to me at the time there would also be a need to make some adjustments in the Administrative Manual in terms of delegations.

First, I assumed that was referring to the line of succession, which has been talked about earlier. The line of succession is very often changed when position titles are changed or when new individuals are employed in the agency or just when the Director determines he or she would prefer a different line up in terms of succession.

Senator STEVENS. You did not conceive the idea for the delegation, is that right?

Mr. HUNT. No.

Senator STEVENS. You did not prepare it, is that right?

Mr. HUNT. It was given to me by the general counsel.

Senator STEVENS. When?

Mr. HUNT. In an earlier form that I think was submitted earlier this morning.

Senator STEVENS. When was it given to you?

Mr. HUNT. I don't recall. It was a week before the term expired. I think it might have been a Tuesday or Wednesday of that week—

whatever those dates are. I frankly don't really recall the actual time.

Senator STEVENS. What was your position at that time?

Mr. HUNT. My position was then, and still is, Associate Director for Administration.

Senator STEVENS. Did you inform the Deputy Director of the delegation of authority?

Mr. HUNT. No, I did not. I understood that the materials in the delegations, along with the job description, the appointing materials, SF-52 and other such documents, were going to be dealt with on the following Monday when I believe Ms. Cornelius, who was on travel that week, was returning, and the documents would be dealt with and discussed with her at that time.

Senator STEVENS. Did you approve the final version prior to its execution by Dr. Devine?

Mr. HUNT. The version that was submitted here, no, I did not. I did not have that version.

Senator STEVENS. When did you finally see the version that was approved?

Mr. HUNT. The approved version I saw on the morning of April 30.

Senator STEVENS. The one I have is dated March 25 and it shows that it came from you—Subject: Delegation of Authority from William M. Hunt, Associate Director of Administration, to Donald J. Devine, Director. You tell us you did not prepare this?

Mr. HUNT. That particular version I don't remember—I did not prepare it. As I was saying, it was given to me by the general counsel the week before in a different version than the one you have in front of you.

Senator STEVENS. Did you under the procedures I remember from downtown—you would have to initial it——

Mr. HUNT [interposing]. No, that copy is not signed.

Senator STEVENS. But you never approved this one in any way.

Mr. HUNT. No, I was asked to put it in a format which I did before which he could use in discussing the issue with Ms. Cornelius.

Senator STEVENS. "He" is Mr. Morris?

Mr. HUNT. Dr. Devine.

Senator STEVENS. Oh, Dr. Devine.

Mr. HUNT. Yes, sir.

Senator STEVENS. When did you first see it after it was executed?

Mr. HUNT. The first time I saw it—it was executed by Dr. Devine—was the morning of April 30.

Senator STEVENS. I am looking for the document that directed the publication of the document, the later publication. This is May 3 where you directed the publication in the OGC Index of the memorandum of the Acting Director revoking the delegations to the Executive Assistant position. That was yours, right?

Mr. HUNT. That's correct.

Senator STEVENS. Was that normally your task to do, to make this determination that something has be be published in the OGC Index?

Mr. HUNT. That material was provided to the general counsel's office after receiving a copy from the general counsel.

Senator STEVENS. I understand that. What I am saying is you are normally the one who makes the decision what gets printed in the OGC Index?

Mr. HUNT. I would not say I normally do. I was giving him that as information based on his submission of the earlier documents on the same date, May 3. My responsibilities would cover the handling of the Administrative Manual and the supplements which are the operating procedures of the agency. Those are different.

Senator STEVENS. The delegation of authority to the Executive Assistant to the Director would normally be published in the Administrative Manual, is that correct?

Mr. HUNT. That's correct, all delegations are published.

Senator STEVENS. But it was not published?

Mr. HUNT. It was not.

Senator STEVENS. Until after the fact.

Mr. HUNT. That's correct.

Senator STEVENS. And my friend here on my right associates some question concerning the timing of that publication with your responsibilities. Did you have that published as soon as it came to your knowledge?

Mr. HUNT. I received the original—are you speaking of the original delegations?

Senator STEVENS. The original delegation was published after the fact, right? After the job had been abolished?

Mr. HUNT. It was published in the OGC Index, which is a separate file in the office of the general counsel for their purposes. When we received the actual signed copies of the original delegations, it was on the 30th. Ms. Cornelius revoked them immediately on the 1st. Therefore, in terms of the Administrative Manual which would come under my jurisdiction, there was no need to publish and unpublish them at the same time. The general counsel included them in his index and, given that, I also transmitted a copy for their record as well of Ms. Cornelius' revocation.

Senator STEVENS. Tell us as succinctly as you can, when did you hear about this delegation of authority to the Executive Assistant to the Director? From whom did you hear it and where?

Mr. HUNT. All right. I heard it the very first time from Dr. Devine when he was mentioning that Ms. Cornelius had agreed to hire him should it be necessary as an assistant and, therefore, we needed to make some changes in the delegations. As I said, I first thought he was speaking of the typical line of succession. I later found no, he meant something quite different in terms of delegations of certain responsibilities to the position.

I might add, Senator, at that stage, talking to him at that moment, there was nothing at hand, and I was a little puzzled as to exactly what that would entail, but I assumed at the time that it meant many, many positions in the organizations had specific delegations allowing them to conduct certain business at the agency, so I assumed it was along those lines.

Senator STEVENS. Just so I understand this, you are the Deputy——

Mr. HUNT [interposing]. Associate.

Senator STEVENS. Associate Director for Administration. You heard about the creation of a new position, the Executive Assistant to the Director. A question of how that would come into a line of succession was raised. Did you ever satisfy yourself as to what was intended with regards to the Executive Assistant to the Director, where that would come in the line of succession?

Mr. HUNT. Let me finish by saying, as soon as Dr. Devine finished speaking to me, I went back to my office and in about 10 or 15 minutes, the general counsel appeared in my office and had copies of the job description that was drafted, I assume, in that office, as well as delegations of authority, as well as line of succession which placed the Executive—well, at that time, actually, I believe a different title was being contemplated. It was not an Executive Assistant. I believe Ms. Cornelius mentioned this morning there was some discussion about the possibility of Executive Director. That was the one, as I remember, that was provided. I was asked to put it in a format.

Senator STEVENS. Let me ask you just a plain question. I hope it is simple. Did any question come into your mind as to how a person whose term was expiring could have a position in the line of succession to a position to which he had not been confirmed for the second time? It seems to me there ought to have been some question raised as to the line of succession question.

I don't have any problem about creating an Executive Assistant to the Director for the purpose of having a temporary position for someone awaiting confirmation. I do have a serious question from the point of view of good administration of having that person suddenly find that he is in the line of succession for the job he would get in the event he is confirmed, but wouldn't be entitled to it if he is not confirmed.

Mr. HUNT. The line of succession contains a variety—at least the older one did—a variety of staff positions as well as operating positions, and it would clearly follow the Deputy Director so it really didn't come to my mind in that instant as a problem.

Senator STEVENS. I am just trying to satisfy myself of one thing. You did not pursue this in any way in terms of the administrative concepts of this new position at that time after the position was created. Is that right? Dr. Cornelius created a new position, Executive Assistant to the Director. You knew about that.

Mr. HUNT. Yes, I did.

Senator STEVENS. Did you inquire as to what was the job description of that new position?

Mr. HUNT. I believe we received a copy of the actual Position Description that Ms. Cornelius signed.

Senator STEVENS. At the time it was signed?

Mr. HUNT. I wasn't in town that week. It was a week later I saw it.

Senator STEVENS. It was handled in a routine manner?

Mr. HUNT. As far as I can tell, yes.

Senator STEVENS. Was there anything to indicate in those documents, when you did see them, that there was a special delegation of authority of the duties of Director to the new Executive Assistant to the Director?

Mr. HUNT. No, there was nothing.

Senator STEVENS. I think I heard it, but my able counsel wants to know, when did you actually receive a copy of the executed delegation of authority?

Mr. HUNT. The morning of April 30.

Senator STEVENS. Where did you get it from?

Mr. HUNT. I had to go to Dr. Devine to get it.

Senator STEVENS. What brought that about? Did you go and ask for it?

Mr. HUNT. I did have to go ask for it, yes.

Senator STEVENS. Did Dr. Cornelius ask you to get it?

Mr. HUNT. Dr. Cornelius' assistant came to me and asked me about it and asked me if I would give her a copy. I told her I would, and I went to Dr. Devine to get it.

Senator STEVENS. Where was that?

Mr. HUNT. It was retained, so far as I know, in his office.

Senator STEVENS. There has been some indication it was in your safe.

Mr. HUNT. It wasn't, not until—not the executed. Not until April 30; the executed document was not given back to me.

Senator STEVENS. Under normal procedures, an executed document would come back to you for inclusion in the Administrative Manual. Is that correct?

Mr. HUNT. That's correct.

Senator STEVENS. Thank you very much.

Senator EAGLETON. All right, Mr. Hunt, let's go through a drill of what did you know and when did you know it because it isn't completely clear, and I commend Senator Stevens for ably trying to clarify it.

Let's focus first on the week prior to March 26. Sometime in that point in time, you got wind of the fact that Dr. Devine wanted to delegate all of his authority to himself when he left. Isn't that the case?

Mr. HUNT. Originally from Dr. Devine I got the first impression that he wanted to make some adjustments in delegations. That was from him initially.

Senator EAGLETON. Initially from him. At first blush, you thought he was simply going to finagle with the line of succession.

Mr. HUNT. That was my impression.

Senator EAGLETON. And you must have had a second conversation with him where you first got wind of the fact that Devine wanted to be divine after he left office; is that correct?

Mr. HUNT. It was during that same conversation, as I mentioned, "You mean the line of succession?" "Well, yeah, that, but I really need to look at some other delegations." I wasn't sure what that meant other than thinking perhaps what he was suggesting is we need to go back as you would any other executive position in the agency and have certain delegations, and I thought at first that is what it was.

Senator EAGLETON. At first you thought that is what it was?

Mr. HUNT. At first.

Senator EAGLETON. The line of succession would be pertinent if we got hit with a nuclear attack or something like that. So later you learned that it was really——

Senator STEVENS [interposing]. There was one in Chicago.

Senator EAGLETON. Nuclear attack?

Senator STEVENS. Someone in a line of succession was in Chicago. You would have been all right. [Laughter.]

Senator EAGLETON. Then in subsequent conversation with Devine, what he was really after was to keep his power, having left office—about to leave office—on March 26 and wanted to delegate it to himself as an assistant to the Director, is that right?

Mr. HUNT. The next thing that happened after the initial conversation, I returned to my office—I was getting ready for a meeting—and I didn't quite know what I was supposed to do; I had to think about it. I had a meeting coming in.

About 10 minutes later, the general counsel arrived in my office with a whole package of drafts.

Senator EAGLETON. All prepared—Mr. Morris, whom we will hear from in a minute, had the whole package: get the special job for Devine; change the line of succession to put Devine in there; and the biggy, keep Devine as emperor, right, to run the shop—delegation, total delegation?

Mr. HUNT. Delegations, yes, sir.

Senator EAGLETON. And that is when you saw for the first time a document—hand him this document. This has been put in the record. It is a document called "Original Delegation of Authority" and that is coming sooner or later.

Senator STEVENS. Senator, let me interrupt you just a minute. Why don't we get all the documents and number them——

Senator EAGLETON [interposing]. We will call this X. [Laughter.]

Senator STEVENS. We will number them in the order they come into the record just so we know what we are talking about.

Senator EAGLETON. This one is called "Original Delegation of Authority." Do you have that document now, Mr. Hunt?

Mr. HUNT. Yes, I do.

Senator EAGLETON. Was that in the packet that you got from Mr. Morris?

Mr. HUNT. Yes, it was.

Senator EAGLETON. Along with creating Devine as Assistant and the line of succession, there was this document. Verbally you had gotten wind of the delegation of authority from Devine earlier, right? Verbally?

Mr. HUNT. I did, yes, sir.

Senator EAGLETON. This is the first time you saw anything in writing on it?

Mr. HUNT. Yes.

Senator EAGLETON. Did you read it carefully?

Mr. HUNT. Yes.

Senator EAGLETON. It says, "All delegations of authority from the Director or the Deputy Director," giving everything Devine had, everything Ms. Cornelius had, "are withdrawn and transferred to the Executive Director who may in turn redelegate the authority at his discretion." Did that strike you as being a bit much?

Mr. HUNT. It sure did. [Laughter.] It was shortly after that, after whatever meeting—I don't remember what it was—I went back in to see Dr. Devine——

Senator EAGLETON [interposing]. You are in the room with Morris——

Mr. HUNT [interposing]. No.

Senator EAGLETON. Did you say, "Didn't you draft this and isn't it a bit much, general counsel?"

Mr. HUNT. I did not, Senator, at the time. The general counsel brought it to my office. I did not look at it at the moment. People were coming in. I placed it on my desk. It was after the conclusion of the meeting I recall actually sitting and reading it. I went in next to see Dr. Devine.

Senator EAGLETON. Did you have the whole packet with you?

Mr. HUNT. At that time I did, yes, sir.

Senator EAGLETON. Did you have that whole package with you?

Mr. HUNT. Yes.

Senator EAGLETON. You went in to see Don Devine and did you specifically discuss with Don Devine the aforementioned original delegation?

Mr. HUNT. Yes, I did.

Senator EAGLETON. Give us the gist of that.

Mr. HUNT. First of all, I went in and asked is this what he was talking about. He looked at it. I don't believe Dr. Devine had seen it up to that point.

Senator EAGLETON. He had not seen it?

Mr. HUNT. I don't know.

Senator EAGLETON. So this is a total creature of Brother Morris?

Mr. HUNT. I can't tell you that. I can tell you who delivered it, but I don't know who actually drafted it.

Senator EAGLETON. Did Covington & Burling write it?

Mr. HUNT. You will have to ask them that.

Senator EAGLETON. Devine had not seen it; you have not seen it.

Mr. HUNT. I said I had the impression Dr. Devine hadn't seen it by just observing his reading it. I didn't believe he had seen it before.

Senator EAGLETON. Transferring not only all of his authority but all of Ms. Cornelius' authority to the new Executive Assistant. Go ahead, tell us what went on in this conversation. Did Devine say, "Yes, that is what I want to do?"

Mr. HUNT. I made the point at the time that I thought that was illegal; that it had rather strong words and it didn't seem to make sense to me, but I, of course, am not a lawyer. I think quite honestly, Senator, I think Dr. Devine agreed because he said, I believe he phoned out to have the general counsel come down to his office, which Mr. Morris did. There was some discussion—I don't remember how long it was. I made the point I thought it was illegal and I think Dr. Devine agreed that it might be and perhaps it was too strong, and certain modifications were made on that draft that——

Senator EAGLETON [interposing]. In your presence in the room?

Mr. HUNT. Yes, sir.

Senator EAGLETON. Who had the yellow pad? Mr. Morris? Was he the modifier?

Mr. HUNT. Well, ultimately I assume but Dr. Devine also wanted to add a provision in the delegations that would say, "All authorities not inconsistent with law," because he was responding to, I think, the concern I think he shared quite honestly that it would be too strong a statement and probably illegal and, therefore, he wanted to modify it to say only those changes, only those delegations that were not inconsistent with the law. He added that provision.

Senator EAGLETON. Who is he, Morris or Devine?

Mr. HUNT. Dr. Devine. The other consideration at the time, I wasn't particularly asked the question, but I volunteered it, as to whether or not—I remember making the statement—I would, even with that, I would be concerned. I don't know if I would sign such a thing or agree to such a thing if I were the Acting Director.

Senator EAGLETON. You said that. Was that with respect to the original document or with this thing that Morris was rapidly and hastily modifying?

Mr. HUNT. It was kind of in general about the whole thing.

Senator EAGLETON. The whole process?

Mr. HUNT. Yes, sir.

Senator EAGLETON. Did it sort of leave you with a little aroma? [Laughter.]

Mr. HUNT. Well, I don't recall. [Laughter.]

Senator EAGLETON. Maybe a tinge of uncertainty?

Mr. HUNT. I think in response to the concern that whether or not it would be an appropriate kind of thing to do——

Senator EAGLETON [interposing]. Was there any suggestion of calling in Ms. Cornelius?

Mr. HUNT. None, I don't believe—I don't know; I don't believe she was in town at the time.

Senator EAGLETON. At the time Dr. Devine was going to take away all her authority, is there any reason why she should not be consulted?

Mr. HUNT. The understanding was, I believe, at the time that the whole matter was going to be discussed with Ms. Cornelius.

Senator EAGLETON. And that was mentioned in this room with Morris and Devine?

Mr. HUNT. Yes, sir.

Senator EAGLETON. And they were going to discuss it with Ms. Cornelius?

Mr. HUNT. Mr. Morris didn't say anything to that effect, but Dr. Devine said he was going to sit down with the package of materials and go over it with Ms. Cornelius.

Senator EAGLETON. So she fully understood what was going on.

Mr. HUNT. That's correct.

Senator EAGLETON. Morris was there and heard all that?

Mr. HUNT. Yes, he was in the room. I assume he heard it.

Senator EAGLETON. That is before March 26. Can you help us with the date?

Mr. HUNT. I would guess and I really can't remember the exact date. It was either the 19 or 20. It was a Tuesday or Wednesday.

Senator EAGLETON. Now, what is the next meeting or act or something you know about in terms of this delegation? The next day, the following day? Let's try to focus on before March 26.

Mr. HUNT. At the time the additional modification was added to the original draft, not only was the provision added "not inconsistent with law" but also language was drawn that said "superceded"—"modified unless specifically revoked by the Director." I think in part there was concern to say there is an additional safety valve, there is a question of not inconsistent with law, supposedly, therefore, you are not violating law and, second, that it would be subject to revocation by the Director at any time. Those changes were made and then there were certain other language changes wn and transferred" were eliminated e delegated" rather than "withdrawn."

Senator Eagleton. Is that the document dated in the upper right-hand corner March 25, "Subject: Delegation of Authority from William Hunt to Donald Devine"?

Mr. Hunt. That language in that document reflects the material here, sir, from that section.

Senator Eagleton. That is the document, though. Although it reflects some material about which you were aware, it does not bear your signature?

Mr. Hunt. That particular document does not. I was asked to take the materials and format it because the materials as presented were done on plain bond and traditionally in the OPM—I assume in many other agencies for that matter—it comes to the person in my job to take materials or ideas of changes in the Administrative Manual, change them, format them for a decision package, which I did.

Senator Eagleton. You took them from where to where?

Mr. Hunt. Don asked that I bring them to him, which I did.

Senator Eagleton. You did prepare then this March——

Mr. Hunt [interposing]. No, I don't know about this one; I don't remember this one at all.

Senator Eagleton. It has your name on it.

Mr. Hunt. The Executive Director was the last version I remember. I do know that there was some discussion as to what the exact title of the position would be and I assumed it would be negotiated between Dr. Devine and Ms. Cornelius.

Senator Eagleton. This is a document that says from you, William M. Hunt, to Donald Devine, Director. It is the day before he goes bye-bye. It is using some bureaucrateze. It says, "All investments"—that is a word they use around here—"all investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate the authority at his discretion."

Why that's pretty—that's got your name. You have not seen that document?

Mr. Hunt. I did not see that specific document until the morning of April 30.

Senator Eagleton. But you knew a document like that——

Mr. Hunt [interposing]. Yes, sir.

Senator Eagleton [continuing]. To that general end——

Mr. Hunt [interposing]. I understood a document like that, and as the other documents, was going to be discussed with Ms. Cornelius on Monday the 25th.

Senator Eagleton. You thought they were going to be discussed with Ms. Cornelius?

Mr. Hunt. That is what I understood.

Senator Eagleton. From Dr. Devine and with Mr. Morris being present.

Mr. Hunt. Yes, sir.

Senator Eagleton. If you didn't prepare it, then either Devine or Morris prepared it, right? You were the three guys in on this?

Mr. Hunt. There were several versions of it prepared. This one, to my knowledge, was not prepared by me. The substance, Senator, is still the same from the earlier discussions. I was asked to format them in a decision management style so that Don Devine could give it to Ms. Cornelius.

Senator STEVENS. Senator Cochran.

Senator COCHRAN. I am wondering what the witness means by the term "format."

Mr. HUNT. To put it in a memorandum format that is traditional with packages that are proposed for changes in the Administrative Manual. Typically, what happens in the agency, various issues or needs for reforms or changes in the Administrative Manual come up from time to time and they work at various staff levels and come up with decisions, lots of folks reviewing it. Ultimately, it is required to come to the Associate Director for Administration for transmittal to the Director, the Director's Office. Typically, the way it works, it goes through the Deputy Director to the Director.

Senator COCHRAN. So format means to put them in a final form, is that what it means?

Mr. HUNT. Well, to put it in memorandum in proper format.

Senator COCHRAN. Put it in memorandum form.

Mr. HUNT. Yes, sir.

Senator COCHRAN. To be sure I understand your testimony, there are three points that I jotted down that you made in your answers to questions from both the chairman and Senator Eagleton with respect to Dr. Devine's involvement in the preparation of the memorandum of the delegation of authority. The first point is that the originally prepared delegation was different from the one finally used in the memorandum.

Mr. HUNT. That's correct. The one that was originally presented to me was different than the one that you see dated March 25, and that was the one we were discussing with Senator Eagleton.

Senator COCHRAN. And the second point that you made was that it was Dr. Devine who insisted that the final version include a provision "not inconsistent with law."

Mr. HUNT. That is correct. And I think, Senator, that the reason for that—I think Dr. Devine felt that the original language as presented was far too strong and wanted to make sure nothing inconsistent with law would be delegated.

Senator COCHRAN. And the third point is that the delegation was specifically made conditional on the revocation by the Director, that the delegation of authority could be revoked by the Director and that was included——

Mr. HUNT [interposing]. That is correct. That modification was added.

Senator COCHRAN. And the Director was Dr. Cornelius.

Mr. HUNT. Yes, the Director they would be referring to at the time the delegation would be in effect at that stage, the Acting Director or any other Director for that matter.

Senator COCHRAN. I have no other questions, Mr. Chairman.

Senator STEVENS. Senator Mathias.

Senator MATHIAS. I have no questions.

Senator STEVENS. I have just one remaining question, and it really is a matter of procedure, I guess. There are a series of other assistants to the Director and the Deputy Director at this time, are there not?

Mr. HUNT. Yes.

Senator STEVENS. And those positions existed prior to the creation of this Executive Assistant position, is that right?

Mr. HUNT. Yes, sir.

Senator STEVENS. Did you participate in the creation of those positions?

Mr. HUNT. I guess participate in that the personnel operations which is under my jurisdiction would be the focus in terms of creating a job, classifying a job. Those sorts of responsibilities typically fall under the personnel office.

Senator STEVENS. Since you have been at OPM, have you had any instance of anyone else who had a special need for temporary income while awaiting confirmation?

Mr. HUNT. No, sir, other than the files we have back in 1981, a very similar position—we called it Policy Adviser to the Acting Director—was created in 1981. It, I believe, was an emergency SES appointment—some of the responsibilities and duties assigned to that are somewhat similar to what is in this version—and it was created at the time by the Acting Director, Arch Ramsey, to provide a position for Dr. Devine while he was going through his original confirmation process.

Senator STEVENS. What was the delegation of authority for that position?

Mr. HUNT. There were no delegations at that time for that position other than a Position Description for the Policy Adviser to the Acting Director.

Senator STEVENS. Do you have any indication from your records whose idea it was to create that position then?

Mr. HUNT. I wouldn't have any way of knowing other than speculating. As you, Senator, were saying earlier, it is very typically done while the confirmation process is underway.

Senator STEVENS. Do any of you have any other questions for Mr. Hunt? We are still not through our time.

Senator COCHRAN. I have no questions, Senator.

Senator STEVENS. We will go to you.

Senator EAGLETON. Senator Levin.

Senator LEVIN. Mr. Chairman, we understand from Ms. Cornelius' testimony this morning that there were two different positions which were presented to her. One was Executive Assistant and the other one was Executive Director. Are you familiar with that? Two descriptions, two positions were presented to her on March 25. One called Executive Director which she rejected, and the other one was Executive Assistant to the Director which she signed.

Mr. HUNT. Yes, I understood that the original thinking was to create the title of the position of Executive Director. I don't know when precisely the other title surfaced actually, but according to Ms. Cornelius at the time that Monday she was presented the two different titles.

Senator LEVIN. Which one were you familiar with when you looked at the sheath of documents the week before.

Mr. HUNT. I was familiar at the time with what was being presented, which was Executive Director.

Senator LEVIN. The final position was called Executive Assistant to the Director. When you looked at the documents the week before, it was Executive Director.

Mr. HUNT. That's correct. I believe on Friday the 22d, there was some discussion that perhaps another title would be more appropriate. I didn't know if it was Executive Assistant, something like that, to make it more of a staff support position rather than an Executive Director position.

Senator LEVIN. Did you participate in discussions where it was stated it would be more appropriate to be just an Executive Assistant rather than the Executive Director, did you participate in a discussion on that issue the week before March 25?

Mr. HUNT. I don't know how many discussions might have taken place and with whom. I have no knowledge other than to say at the time it occurred to me and I mentioned that the Executive Director title could cause trouble.

Senator LEVIN. You felt——

Mr. HUNT [interposing]. At the time I felt it would seem to establish—you go back to the days of the Civil Service Commission, the Executive Director's function, as I understand, was basically to manage the agency on a day-to-day basis.

Senator LEVIN. And you didn't think that was appropriate, that implication in that title?

Mr. HUNT. I thought it could cause trouble, yes, sir, sending the wrong signal.

Senator LEVIN. You were not aware of the fact she was presented with two different titles on March 25?

Mr. HUNT. Unfortunately, I wasn't in town that week. I was away. I wasn't party to that discussion, so I really can't speak to it factually.

Senator LEVIN. The March 25 document which is from you, was it authorized by you, even though you didn't actually prepare it and sign it?

Mr. HUNT. I prepared a draft and a document similar to this. I don't believe—I know it didn't have the Executive Assistant to the Director title; it had the Executive Director title. I was asked to present it to the front office, to Dr. Devine, who in turn would use that in conversations with Ms. Cornelius the following week.

Senator LEVIN. Now that you have seen this document, was that authorized by you, this document, to go under your name?

Mr. HUNT. Authorized by me? I was asked to present it to the Director and I presented it to the Director in the form he asked it to be for his review, discussion, and ultimate decision, as I understood at the time, with Ms. Cornelius.

Senator LEVIN. Do you feel comfortable with the phrase "all delegation of authority shall be delegated to the Executive Director"—now that you see what was done on March 25 in your name, are you comfortable with it?

Mr. HUNT. I looked at the first paragraph, the beginning paragraph which lists "but not inconsistent with law" and "unless specifically revoked by the Director." I still really didn't feel, personally, that it was the kind of thing I would have done in that position, but I am not a lawyer and just reading it on its face, at least in terms of the words here, I had no reason to question its legality. And, of course, our general counsel felt it was legal.

Senator LEVIN. I am not talking about its legality. I want to know if you are comfortable with it. It is the kind of thing you would not have done if you were Director?

Mr. HUNT. The problem with any job you set up, you probably need to deal with questions of delegations. Typically, delegations are determined on a function-by-function basis. The problem in this particular one is it is rather broad.

Senator LEVIN. Senator Eagleton, just stop me whenever you want to take over this time.

Mr. HUNT. Senator, may I add one more statement to that? I think in all fairness to get the story balanced as best I can, I also believe that that was the interest that Dr. Devine, as well—I thought he was concerned about not doing anything illegal. That was my impression.

Senator LEVIN. There was a job description, Executive Assistant to the Director, which apparently Dr. Cornelius approved, which said that Mr. Devine would work under the direction of the Deputy Director. Are you familiar with that.

Mr. HUNT. Yes, sir.

Senator LEVIN. That was part of the package.

Mr. HUNT. Yes, sir.

Senator LEVIN. So that part of the package says that he will work under the direction of the Deputy Director. Another package under your name says that all authority which the Director has is delegated to Devine. How in the name of heaven——

Mr. HUNT [interposing]. The Position Description does just that, it describes the basic duties and responsibilities; the functions that the job will carry out.

Senator LEVIN. Doesn't it say it is under the direction of the Deputy Director?

Mr. HUNT. Yes, it does.

Senator LEVIN. How in the name of heaven can that be consistent with another document in your name which says all the powers of the Director are delegated to the Executive Assistant?

Mr. HUNT. As I understood it at the time, when you delegate, you don't surrender, you extend. My understanding was the legal implication of it was that it was extending from the Director to this new position those responsibilities and those authorities that were not inconsistent with law.

Senator LEVIN. My question is very precise. That document says it will be under the direction of the Deputy Director. That document delegates it all. Is that why——

Mr. HUNT [interposing]. I am not a lawyer on that case. I am telling you my impression was——

Senator LEVIN [interposing]. I am not asking you if you are a lawyer. I am asking for common sense. Does that make common sense to you?

Mr. HUNT. You see, I didn't see the delegations as written here as taking away necessarily power from the Director or Acting Director positions but extending those authorities in that particular position. I didn't see it substituting or eclipsing the responsibilities of the Acting Director.

Senator LEVIN. You are giving the word "delegated" totally new meaning.

Mr. HUNT. That is what I understood at the time.

Senator LEVIN. That is not in the dictionary. Did you make any inquiries as to whether or not Dr. Cornelius was notified of this delegation when you got back after March 25?

Mr. HUNT. I recall—of course, I didn't get back March 25; it was April 1.

Senator LEVIN. When you got back after March 25.

Mr. HUNT. Yes, sir.

Senator LEVIN. Did you make any inquiry or act under the understanding that she was informed and had approved the delegation? Did you have conversation?

Mr. HUNT. I didn't have any conversation with Ms. Cornelius.

Senator LEVIN. Did anybody?

Mr. HUNT. I did—I don't remember exactly when because when I returned, the confirmation process had begun, I believe, on that morning. I think I might have gotten a chance to ask what happened, and I understood everything had been taken care of. That's all.

Senator LEVIN. Was there any conversation with anybody during April before you found a copy of this thing suddenly on April 29 or 30, any conversation with Devine, with Morris, with anybody relative to the question of whether Dr. Cornelius had been informed of the delegation or knew of the delegation?

Mr. HUNT. I had none, no, sir.

Senator LEVIN. But you considered it to be a critical issue as to whether or not she would be informed of the delegation. Is that correct?

Mr. HUNT. I was told that she was going to be informed of it. Yes, I would consider it important.

Senator LEVIN. As a matter of fact, the whole subject of what powers would be in whom was the subject of that meeting that you had with Morris and Devine, wasn't it?

Mr. HUNT. Yes, in terms of that first draft.

Senator LEVIN. So much so you redrafted some documents.

Mr. HUNT. Well, actually Dr. Devine himself made most of those changes.

Senator LEVIN. That issue of which powers rest in whom was so important that documents were redrafted relative to it.

Mr. HUNT. Yes, sir.

Senator LEVIN. Were you surprised to find out that Dr. Cornelius was never notified of that delegation?

Mr. HUNT. I did not have any indication one way or the other. I was surprised——

Senator LEVIN [interposing]. My question——

Mr. HUNT [interposing]. Yes.

Senator LEVIN. That is a pretty straightforward question. Were you surprised to find out Dr. Cornelius was not notified of that delegation?

Mr. HUNT. Yes.

Senator LEVIN. Thank you.

Senator **Eagleton**. Mr. Hunt, had you been told this had been kept from Dr. Cornelius, you would have refused to sign that March 25 memo, isn't that correct?

Mr. **Hunt**. I would suspect so. I understood it was going to be discussed.

Senator **Eagleton**. Truthfully you didn't like this whole idea, did you?

Mr. **Hunt**. I wouldn't have done it.

Senator **Eagleton**. You wouldn't have done it. And you didn't like being part of it, did you?

Mr. **Hunt**. Not particularly.

Senator **Eagleton**. Were you just as happy that you were out of town when some of this work was going on? [Laughter.]

Mr. **Hunt**. No, not really. That whole trip had been planned for some months.

Senator **Eagleton**. Did Mr. Morris or Devine impress upon you in any of those meetings the need to keep this sort of in-house?

Mr. **Hunt**. I don't recall any conversation with General Counsel Joe Morris on that subject.

Senator **Eagleton**. How about Mr. Devine?

Mr. **Hunt**. My view of the situation was simply that this matter was going to be discussed with Ms. Cornelius, that it was being done in a way to make sure there was some continuity, I understood, in the agency because I don't believe Dr. Devine expected the confirmation process to extend more than a few days, if at all, over the term expiration. That was my view of it, and it was not to be effectuated in the agency officially; it would have to be published in the Administrative Manual.

Senator **Eagleton**. It would have to be published in the Administrative Manual?

Mr. **Hunt**. That would be my view.

Senator **Eagleton**. And it also would have to be published in the OGC Index Digest?

Mr. **Hunt**. You will have to ask the general counsel about that.

Senator **Eagleton**. You are the administrative officer, right?

Mr. **Hunt**. Yes, sir.

Senator **Eagleton**. Is there any decision more important in the agency than the decision as to who, in fact, runs the agency?

Mr. **Hunt**. I think that is pretty important.

Senator **Eagleton**. Should the public know that?

Mr. **Hunt**. I would say so, yes.

Senator **Eagleton**. Shouldn't the Congress know who is running OPM?

Mr. **Hunt**. Yes.

Senator **Eagleton**. Is there any reason that it should be treated with secrecy and kept in Mr. Devine's safe, kept not only from the public, from the Congress but from the Acting Director, Dr. Cornelius?

Mr. **Hunt**. I would say no.

Senator **Eagleton**. Would people of high office who would act in such a stealthful way have something on their conscience that bothered them when they keep this hidden up in Devine's safe?

Senator **Stevens**. That is not really a question.

Senator EAGLETON. I will ask Dr. Devine that. Incredible. It was very clear, and Morris was there, Morris the draftsman, Morris the executioner—[laughter]—it was very clear when Morris was there that Devine was going to take this all up with Ms. Cornelius, right, that was your understanding?

Mr. HUNT. That was my impression at the time, sir.

Senator EAGLETON. During all of these meetings with Devine and Morris on the delegation, did Devine say why he wanted this delegation, or did Morris say why he wanted his friend Devine to make the delegation to Devine? This is Devine to Devine.

Mr. HUNT. I understood the fundamental reason to be that it was creating a position, that Ms. Cornelius agreed to bring him on board and wanted to make sure he had the ability to function in that position and to carry on in certain ways that would be, I assumed, agreeable between the two parties.

Senator EAGLETON. Agreeable between the two parties if Ms. Cornelius had——

Mr. HUNT [interposing]. Certainly the provision of revocation would suggest that. If there wasn't an agreement, it would be revoked.

Senator STEVENS. Senator Cochran.

Senator COCHRAN. I have no further questions.

Senator STEVENS. Senator Mathias.

Senator MATHIAS. Mr. Hunt, your title is Associate Director for Administration?

Mr. HUNT. Yes, sir.

Senator MATHIAS. What are your professional qualifications for that position?

Mr. HUNT. My professional qualifications, well, I have been in that particular job for approximately a little over 2 years. Prior to that, I was Special Assistant in the Office of the Director, OPM. I have worked for better than 3 years in—actually a little over 6 years in the State of Maryland government. I had several positions there. One was assistant to the secretary of budget and fiscal planning. My job there was to handle legislation and review proposals submitted in the General Assembly for comment by the Governor. I headed up a number of State agencies, the community development administration being one and the department of economic and community development. I managed about six or seven other major historical cultural agencies in the State of Maryland as an overseer on behalf of the secretary of economic and community development and have had housing development and finance assistance experience in the past.

I have served on the Hill for a couple of years as a staff assistant back in the late 1960's to a Member of Congress at the time, and I have served a little over 3 years also with the U.S. Department of Agriculture, holding several policy positions in the Farmers Home Administration. So I have had, I guess, close to, I don't know, 17, 18 years of various government experience, sir.

Senator MATHIAS. You have a lot of experience with civil service positions both in the Federal Government and the State government?

Mr. HUNT. Yes, sir.

Senator MATHIAS. If a situation of this sort had come to your attention as the Associate Director for Administration—let us say a regional director of some agency had made an arrangement of this sort without notifying headquarters of OPM. What would have been your official reaction?

Mr. HUNT. You mean within our own organization if a regional director had done something like this?

Senator MATHIAS. Anywhere in the civil service, because we are, after all, looking at a situation which will be viewed very broadly by the people in the civil service as an example. What would your——

Mr. HUNT [interposing]. I would think it is inappropriate if the actions were taken and the appropriate parties were not at least advised.

Senator MATHIAS. Would it have been appropriate given the state of the law, even if there were knowledge on the part of——

Mr. HUNT [interposing]. That I don't know. Again, I am not a lawyer, and I don't have the legal experience to make that determination. I think in this case, it has been questioned.

Senator MATHIAS. But you would have condemmed it as an administrator, if there had not been full knowledge on the part of all parties.

Mr. HUNT. Yes, sir.

Senator MATHIAS. Thank you, Mr. Chairman.

Senator STEVENS. Any further questions? Senator Cochran?

Senator COCHRAN. No questions.

Senator STEVENS. Gentlemen, do you have any further questions?

Senator EAGLETON. Knowledge of all parties means knowledge of the public when you are dealing with the total transference of power from someone leaving office to someone purportedly coming on as assistant. Isn't that correct? Knowledge of all the parties means the public, Congress and everyone, who is running the agency.

Mr. HUNT. Exactly.

Senator EAGLETON. Senator Levin?

Senator LEVIN. Just a few questions. Again, whose idea was this delegation of authority?

Mr. HUNT. As I mentioned, I believe, in some other questions, it was raised in the context from Dr. Devine that we needed to set up this position, that he had been negotiating with Ms. Cornelius and there would need to be a modification of certain delegations. The initial draft of the material was provided by the general counsel.

Senator LEVIN. The short answer to that question was it was Dr. Devine who proposed it?

Mr. HUNT. Senator, are you saying he proposed the specific language initially?

Senator LEVIN. No, that there be a delegation of authority memorandum?

Mr. HUNT. The first time I heard about it was from Dr. Devine.

Senator LEVIN. Did you approve and recommend the final form of this document?

Mr. HUNT. I did not sign this particular document. I did provide earlier drafts which had different titles of Executive Director to Dr.

Devine with the intention he was going to discuss those with Ms. Cornelius the following week.

Senator LEVIN. And your recommendation of approval of that was based on his discussing the delegation with her?

Mr. HUNT. That was my understanding at the time, sir.

Senator LEVIN. And your approval, your recommendation that he sign this, was based on that understanding?

Mr. HUNT. Yes, sir.

Senator LEVIN. Thank you.

Senator EAGLETON. Mr. Chairman, I, too, as Senator Gore did earlier, wish to commend not only Dr. Cornelius who is still with us, but also Mr. Hunt for giving forthright answers. This has not been an easy or happy experience for either of you. It has been a difficult experience for both of you. You have both been very forthright and candid to this committee, and I wish to salute both and so do. That is all I believe we have for Mr. Hunt.

Senator STEVENS. We go down now to Mr. Morris. Mr. Morris, you are the general counsel of OPM?

Mr. MORRIS. That is correct, Senator.

Senator STEVENS. When did you become general counsel of OPM?

Mr. MORRIS. In July 1981.

Senator STEVENS. How long have you been an attorney?

Mr. MORRIS. Since 1976.

Senator STEVENS. You have been here during this whole period concerning the delegation of authority to the Executive Assistant to the Director. Was that your idea?

Mr. MORRIS. I'm sorry, Senator, was what my idea?

Senator STEVENS. The delegation of authority from the Director to the Executive Assistant to the Director, was that your idea?

Mr. MORRIS. Yes, sir, it was my idea that there be a delegation of authority. In the latter part of February and the early part of March of this year, as Director Devine contemplated the prospect that he would not be reconfirmed by the time his term ended at midnight on March 25, we talked about possible arrangements that could be made to continue his service in the agency during the interim period. He asked me to give consideration to what options existed for the interim continuation of his service, ranging from a continuation in the agency in a position of line authority, subordinate to that of the Acting Director but superior to that of all the other support personnel, to the extreme of another position entirely outside OPM. I thought over those questions and I presented him, in the course of conversation, with a number of ideas. Finally, on either March 18 or 19, he asked me to assemble my thoughts about the documentation that would be appropriate for the establishment of the position of Executive Director of OPM, a position of wide-ranging responsibility over the operations of the agency and with wide-ranging responsibility to give policy advice to the head of the agency, a position that would be immediately subordinate to the position of the head of the agency. Therefore, on March 20, I delivered to Mr. Devine in his office a set of papers that represented my thinking in response to that assignment.

They were papers that would create the position of Executive Director and would endow that position with described responsibilities. The papers included the delegation of authority, other paperwork, and a short checklist of actions that would be necessary to effectuate it.

Mr. Devine quickly looked over my submission as I sat across his desk. He handed the papers back to me on March 20 and said, Hunt is going to take care of this. See they get to him. I left Mr. Devine's office, walked them down to the office of Bill Hunt, and personally delivered the whole package to him.

In that sense, then, as far as I know, that was the first time that an instrument, a draft instrument, styled delegation of authority was prepared in this case. I prepared it and I prepared it in response to that assignment.

Senator STEVENS. I assume when you did that, you knew the provisions of the statute creating the office of the Deputy Director which said the Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or when the office of Director is vacant.

Mr. MORRIS. Absolutely, and the instrument I prepared contemplated that the Deputy Director would be the Acting Director; that is, the head of the agency during the time those instruments were in effect.

Senator STEVENS. The delegation of authority that you first prepared said, "All delegations of authority from the Director or Deputy Director are withdrawn and transferred to the Executive Director who may, in turn, redelegate authority at his discretion."

Mr. MORRIS. The single most important word in that draft delegation is the preposition "from." It refers to "all delegations of authority from the Director and the Deputy Director"—not "delegations of authority to" them. Delegations of authority proceed from the Director and Deputy Director to subordinate officials of the agency, including the Associate Director for Administration, the general counsel, and all of our colleagues.

My initial draft took no power from the Director or Deputy Director. Instead, it channeled all of the authority that flowed from them to their subordinate officials through an intermediate subordinate immediately subordinate to the Acting Director.

Senator STEVENS. Did you approve the one on March 25, the one that was finally executed?

Mr. MORRIS. On——

Senator STEVENS [interposing]. Just answer me. Did you approve it or didn't you?

Mr. MORRIS. I approved it in a form very similar——

Senator STEVENS [interposing]. "All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director"—you just explained to me how good the first one was. Now tell me what is so good about the second one. [Laughter.]

Mr. MORRIS. Well, as Mr. Hunt correctly stated the legal proposition——

Senator STEVENS [interposing]. He is not a lawyer. I am asking you as general counsel.

Mr. MORRIS. I am complimenting him on his jailhouse lawyering. The delegation of authority that was finally executed by Mr. Devine on March 25 deprived the head of the agency of no authority. A delegation of authority surrenders no authority. The delegation of authority shares that authority and that is what I understood Director Devine's instruction in the drafting exercise to be.

Senator STEVENS. Now wait a minute. I am just a country lawyer perhaps. I want you to know, this person is going out of office in about 12 hours and he is delegating to a position all of the authority that he has as Director to the Executive Assistant to the Director, and in that delegation he is withdrawing all of the delegations of authority that previously had been made and delegating them to the new position. If that ain't pulling yourself up by your bootstraps, I don't know what it is.

Mr. MORRIS. The delegation of authority revoked no one else's authority. The delegation of authority——

Senator STEVENS [interposing]. Did it purport to give him authority as Executive Assistant to the Director which he would not have as Executive Assistant to the Director normally?

Mr. MORRIS. Senator, the position was entirely without precedent. There is no normal situation to which I can speak.

Senator STEVENS. I don't know of any other place in Government where the assistant to the No. 2 in Government has all of the authority of the No. 1, do you?

Mr. MORRIS. That situation occurs when the No. 2 in Government is the No. 1 in the agency and that was the situation on and after March 26.

Senator STEVENS. Not at the time this was executed.

Mr. MORRIS. At the time this was executed the powers were not vested. Several intermediate steps were required for that to be, including Ms. Cornelius becoming the head of the agency and Ms. Cornelius making her own independent determination to fill that position.

Senator STEVENS. She did that on the day before, the day before he left office, didn't she?

Mr. MORRIS. She appointed him on March 26.

Senator STEVENS. The day after, pardon, the 26th. In terms of the delegation of authority, are you saying, in your judgment as a lawyer, that the Director delegating authority to the Executive Assistant to the Director, somehow or another you don't believe that that was bypassing the Deputy position itself?

Mr. MORRIS. No, sir, it was always intended that the position be unambiguously subordinate to that of the Deputy Director. The Position Description, which was prepared along with it, a document simultaneously to be issued as the principal document involved in the creation of the position, makes it abundantly clear.

Senator STEVENS. Did you prepare the Position Description?

Mr. MORRIS. I prepared the earlier draft of the Position Description which was very similar to the Position Description ultimately approved.

Senator STEVENS. It says, "The Executive Assistant to the Director reports to the Deputy Director." Why didn't you make it the Acting Director?

Mr. MORRIS. I don't recall specifically, Senator. Certainly the intention was to make it clear that Mr. Devine's new position would be subordinate to the position of Loretta Cornelius, whether the agency had a Deputy Director or Acting Director.

Senator STEVENS. My time is up. I want to ask you one last question, though, before I give up this side. Did you tell Ms. Cornelius about this when she became the Acting Director?

Mr. MORRIS. No, sir.

Senator STEVENS. Why not? She was the boss then, wasn't she?

Mr. MORRIS. Absolutely.

Senator STEVENS. Did you tell her what authority Dr. Devine had?

Mr. MORRIS. I told her about that authority. I answered that question when she asked it. [Laughter.]

There was no occasion prior to April 29 when she asked it. The reason why I never discussed the matter with her is because I didn't think there was any question about it.

Senator STEVENS. I understand you are all walking on eggshells because if Dr. Devine is confirmed, obviously he is going to be No. 1 again. I can't understand why you wouldn't tell her Dr. Devine delegated to himself all the powers of his office notwithstanding the fact she had just become Acting Director.

Mr. MORRIS. Because I did not think, and I still do not think, that there was any secret as to what Dr. Devine's role in the agency on and after March 26 was. Dr. Devine——

Senator STEVENS [interposing]. What do you think the statute gave him a 4-year term for?

Mr. MORRIS. The statute gave him a 4-year term precisely so if he was going to be reappointed, the President would be required——

Senator STEVENS [interposing]. So if he continued in office after 4 years, it would require consent of the Senate, isn't that correct? If he was going to continue to be Director any time after 4 years, he required reconfirmation by the Senate and here sit the two fellows that required that, Brother Mathias and Brother Stevens.

Mr. MORRIS. Absolutely, Senator, and I respectfully submit to you he did not continue in office after March 25.

Senator STEVENS. Who the hell was he working for?

Mr. MORRIS. Loretta Cornelius and the President of the United States.

Senator STEVENS. It says here in the documents he is still performing functions of the Director.

Mr. MORRIS. Performing functions and having responsibility are very different things. [Laughter.]

He did not hold any authority uniquely. All his authority was derivative of that of Acting Director Cornelius who could dismiss him at any time or who could modify his authority at any time. I might add, by the way——

Senator STEVENS [interposing]. I shall return.

Senator MATHIAS. Senator Eagleton, would you bear with me for one single question? Mr. Morris made a very intriguing statement. He said he thought it was no secret what the status of Dr. Devine's position was after March 25. What was it, in your judgment?

Mr. MORRIS. Dr. Devine after March 25 was exercising general administrative management and policy responsibility authority in the agency subject to the superior authority of Loretta Cornelius.

Senator MATHIAS. If nobody knew about the delegation, how was it not a secret?

Mr. **Morris**. Well, for openers, on March 25, 1985, Monday morning, Mr. Devine convened a meeting of the senior policy staff of the agency in his conference room. Ms. Cornelius was present. At that meeting of the senior staff, all of the heads of the offices—except for Mr. Hunt, who was out of town on vacation—and certainly Ms. Cornelius were present. Mr. Devine opened the meeting by saying, "Well, my term of office is going to expire tonight. Tomorrow Loretta will become the Acting Director. I want to tell you what my situation is going to be. I am going to continue in the agency. I am going to be Loretta's Executive Assistant. I will continue to have a general supervisory responsibility and authority over the agency," and he said emphatically, "We will continue to do business," specifically referring to the paper mill, the process of sending documents up for final agency action by the agency head, "the same way." He said, "There will be no change in the way we do things around here except for one thing; instead of routing the paper to Ms. Cornelius first and then to me for final signature, we are going to reverse that; we will route the paper to me first and then to Ms. Cornelius for final signature."

I then raised the question, "Shall we begin changing the signature blocks; should we not begin changing signature blocks to reflect that Ms. Cornelius is the Acting Director?" Mr. Devine said, yes, signature blocks should be changed as needed to reflect this new process, but otherwise let the process continue as it has. I recall Ms. Cornelius in that meeting saying, "I"—she laughed as she said it, and she used the second person in referring to Mr. Devine—"I don't want to see any paper unless you've seen it first." A very friendly, humorous point meaning she wanted him to sign on the dotted line before something was presented to her for final agency action to be taken. That, coupled with the press release, with the continuing process of Mr. Devine being summoned up by congressional committees to appear here and the like, all of that, the entire bundle of these relationships and activities, left no ambiguity to those of us involved in the day-to-day life of the agency that Ms. Cornelius was the boss; she was in charge as the Acting Director, but under her, Dr. Devine was continuing to exercise a very broad supervisory authority over the agency.

Senator **Mathias**. Except the ambiguity of the delegation.

Mr. **Morris**. Senator, there is no ambiguity in that delegation. It must be read together with the Position Description and, for that matter, the chain of succession. It deprives the head of the agency, the Acting Director, of no authority because it cannot, and on its terms it does not purport to do so. It purports to share that plenary responsibility for oversight of agency activity with this now senior deputy to the head of the agency and that, I submit, is not exceptionable in agency practice.

Even in OPM itself, what does it mean when the use of that line of succession is triggered? It means precisely that full authority in the agency is going to be exercised in the absence of the Director, whoever that is, by some subordinate on that list. Plenary authority over an agency may be exercised, even by a subordinate who is neither Presidentially appointed nor Senate confirmed. You know something, there have been times when Ms. Cornelius and Mr.

Devine have both been out on the road, when there have been subordinate Acting Directors of the agency——

Senator STEVENS [interposing]. That could have worked for another 4 years, couldn't it?

Mr. MORRIS. No, sir.

Senator STEVENS. Why not?

Mr. MORRIS. Because I don't think the President and Senate would have stood for it, nor would have Mr. Devine or Ms. Cornelius.

Senator STEVENS. It worked for 1 day, why couldn't it work for 4 years, legally? You are general counsel, if you signed something that worked for 1 day, why wouldn't it work for 4 years? Why didn't you tell Devine, "Withdraw your name, you can run the agency from the Executive Assistant to the Director"?

Mr. MORRIS. It is a question of prudence. [Laughter.] I don't think that would have been Mr. Devine's preference.

Senator EAGLETON. Mr. Morris, when Dr. Devine had that burst of candor on March 25 at the meeting, Ms. Cornelius was there, Mr. Hunt was in Florida, lots of people were there. Did he also say he had signed a delegation of his authority as Director of OPM over to himself as an Assistant to Ms. Cornelius?

Mr. MORRIS. He said nothing in that meeting about any instrument.

Senator EAGLETON. He had this burst of candor that you described about changing the boxes and he and Loretta were joking around about changing the boxes. There was a lot of good healthy humor, but he didn't tell the staff or the Congress or anybody except you, and Mr. Hunt got a whiff of it, that he transferred his power under your legal genius from Director Devine to Assistant to the Acting Director Devine. That he held secret.

Mr. MORRIS. I deny all those characterizations. They are not so.

Senator EAGLETON. Did he hold it secret from that group?

Mr. MORRIS. I don't believe so. He did not hold secret——

Senator EAGLETON [interposing]. Did you or Dr. Devine make public the delegation document?

Mr. MORRIS. I did.

Senator EAGLETON. You made it public when?

Mr. MORRIS. I disclosed its existence on at least three occasions.

Senator EAGLETON. Beginning when?

Mr. MORRIS. First, when I first learned it had been signed, which was on April 5.

Senator EAGLETON. To whom did you make it public?

Mr. MORRIS. My staff.

Senator EAGLETON. Your staff?

Mr. MORRIS. Yes, in——

Senator EAGLETON [interposing]. Did you publish it in any Federal directory—the Federal Register, the OGC Index Digest? You have something to do with that.

Mr. MORRIS. Yes.

Senator EAGLETON. Did you publish it in the OGC Index Digest?

Mr. MORRIS. "OGC Index Digest" is a fancy name for an internal agency filing system. It is not a printing press. It is a set of files that are open.

Senator EAGLETON. Aren't things filed in there?

Mr. Morris. Yes, sir.

Senator Eagleton. And didn't you file this document on May 3 when the cat was out of the bag?

Mr. Morris. I filed it on May 3 when it was in my possession.

Senator Eagleton. Come on now, counsel, you helped concoct this document; you drafted the first smelly draft that was so smelly that Mr. Hunt, a nonlawyer, said this reeks. The poorest form of legal craftsmanship. He wouldn't touch it. Then you redrafted it—and then it was filed in Devine's cabinet—never divulging to anybody until the cat got out of the bag on May 3. When it was in the press and everything, you quickly filed it in the OGC Index.

Why wasn't it filed there on March 25 or March 26 or March 27?

Mr. Morris. In answer to your question, Senator, I don't want the record to reflect I am accepting any of your characterizations.

Senator Eagleton. No, your acts speak for themselves, Mr. Morris; they need no characterization. Your acts speak for themselves. Your misconduct speaks for itself.

Mr. Morris. I filed those instruments in my file on none of the dates you have mentioned because I did not know that the instrument had been executed until April 5, and I did not possess a copy of the instrument until either April 30 or May 1.

Senator Eagleton. Did you tell anybody at the White House about the transference of power?

Mr. Morris. No, sir.

Senator Eagleton. Isn't it a fairly important thing in the scheme of things within an agency, a big agency, an important agency, as to where the power is reposed? Isn't that something the public at large ought to know, the Congress ought to know, the White House ought to know?

Mr. Morris. Yes, sir.

Senator Eagleton. And, thus, wasn't this delegation of authority, this document, delegating authority in the scheme of things, a very important document?

Mr. Morris. Yes, sir.

Senator Eagleton. OPM-wise?

Mr. Morris. Well, it's an important document in that context. It is not an important document when separated from the other documents; when separated from the context.

Senator Eagleton. Who is running the shop is a pretty important thing in any agency, isn't it?

Mr. Morris. And there was never any doubt about that point.

Senator Eagleton. No doubt about it.

Senator Stevens. Publicly who knew?

Mr. Morris. Senator, I think the world knew that Ms. Cornelius was Acting Director and that Donald J. Devine was a very important figure in the continuing life of the agency subordinate to her. Certainly the U.S. Senate and the House of Representatives of the United States knew that Dr. Devine was an important figure in the agency because they kept calling him up here for nonconfirmation-related subsequent hearings.

Senator Eagleton. How long have you known Donald Devine?

Mr. Morris. I met him for the first time in, I think, 1972. It may have been in 1973.

Senator Eagleton. Might it have been in the 1972 campaign?

Mr. MORRIS. No, sir.

Senator EAGLETON. Did you ever know him in a political context?

Mr. MORRIS. No, sir.

Senator EAGLETON. When he was about to become Director of OPM, did he contact you with respect to becoming general counsel?

Mr. MORRIS. Yes, he did.

Senator EAGLETON. And he selected you to be his general counsel?

Mr. MORRIS. He did.

Senator EAGLETON. And you are appreciative of the fact?

Mr. MORRIS. I am.

Senator EAGLETON. A good friend selected you for this prestigious position?

Mr. MORRIS. He is a good friend; it is a high honor.

Senator EAGLETON. And you felt a great sense of personal responsibility to him as his days in office were dwindling down to a precious few in March of this year.

Mr. MORRIS. A sense of personal loyalty to which I would never subordinate my legal, professional, and ethical obligations.

Senator EAGLETON. And so it was your idea and your idea alone as a selfstarter that Don Devine ought to continue as ad hoc Director of OPM after midnight of March 25.

Mr. MORRIS. No, sir. Mr. Devine did not continue as the ad hoc Director of the agency and my activities and draftsmanship emerged from a dialog with him about what his role in the agency after March 25 would be. It was not the role of an ad hoc Director.

Senator EAGLETON. Why was Ms. Cornelius so surprised about all this on April 29 if the whole world knew?

Mr. MORRIS. I don't know.

Senator EAGLETON. Did she act surprised to you when she first heard about it?

Mr. MORRIS. No, sir, our meeting on April 29 was very brief and very cordial.

Senator EAGLETON. I didn't say it was either lengthy or uncordial. She just took it in stride—"Well, win a few, lose a few; I'm not running this place," right? [Laughter.]

Mr. MORRIS. That characterization would not describe her reaction. Her reaction was one of interest and gratitude to me for the information. [Laughter.]

Senator EAGLETON. Do you remember when Mr. Hunt was in the room and either you or Devine promised to tell Ms. Cornelius about all of this when you were cooking up this plan?

Mr. MORRIS. The occasion on which Mr. Hunt and I were in the room with Mr. Devine was Friday March 22. I arrived at the meeting after it was in progress. Mr. Hunt and Mr. Devine were already talking. I was handed by the two of them an already typewritten instrument and was asked to prepare some revision on the typescript. While, yes, I do recall as a general proposition that Mr. Devine said he was going to be meeting that day or the following Monday with Ms. Cornelius to discuss the particulars of the new arrangement, I recall no specific mention by Mr. Devine of any particular pieces of paper.

Senator EAGLETON. But it was clear—Mr. Hunt heard it—that Dr. Cornelius was going to be fully apprised of what these new arrangements were, all this delegation of authority, et cetera, she wasn't going to be kept in the dark about any of this, is that right?

Mr. MORRIS. I did not hear any such exchange of words, but, yes, it certainly was my understanding Mr. Devine and Ms. Cornelius were going to discuss the full nature of the relationship.

Senator EAGLETON. And as the author of much of this—more than author—as the instigator, ad hocker of this whole process, you felt no obligation to discuss any of this with Acting Director Cornelius, whom you say was under law and, in fact, still running the agency?

Mr. MORRIS. It was not my place to intrude upon the relationship between the two of them——

Senator EAGLETON [interposing]. You are affiliated as her counsel.

Mr. MORRIS. I would not hesitate to discuss the matter with her at her request. I must tell you, in the 4 years of my relationship with her as the general counsel of the agency, I have always made myself forthrightly available to her, but always at her request.

Senator EAGLETON. But you were only going to tell her as much as she could weasel out of you by question and answer?

Mr. MORRIS. No, that characterization is unfair, Senator. I understood Mr. Devine and Ms. Cornelius to have an intimate official relationship of their own. It was not my responsibility to be the intermediary between the two of them. I would not hesitate to serve either of them or to answer truthfully any question put to me by either of them or prepare legal advice or legal instruments at the request of either of them at any time.

Senator STEVENS. This is a good time for about a 10-minute recess.

[Brief recess.]

Senator STEVENS. Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Chairman.

Just as we broke for the recess, Mr. Morris, you testified that at that March 22 meeting, the delegation had already been drafted before you entered the room.

Mr. MORRIS. Yes, sir.

Senator EAGLETON. Who was in the room when you entered?

Mr. MORRIS. Mr. Devine and Mr. Hunt.

Senator EAGLETON. So the delegation had already been drafted by the two nonlawyers before the lawyer entered the room?

Mr. MORRIS. The typescript was clearly based in part on the materials I transmitted to Mr. Devine and Mr. Hunt on March 20, but it had other material of which I was not the author.

Senator EAGLETON. Did you redraft it when you got there?

Mr. MORRIS. Yes, sir.

Senator EAGLETON. You testified, I think, to Senator Stevens' question, that the final document—being dated March 25, on which Mr. Hunt's name appears but not signed by him—is pretty close to your final document, it's not exactly what your final document was, but very, very close to it, words to that effect.

Mr. MORRIS. It was very close to it. It was not identical to it, but it was very close.

Senator EAGLETON. Also right before the break, you testified the working relationship between Mr. Devine and Ms. Cornelius was close and intimate. Were they really all that friendly as Director and Deputy Director?

Mr. **Morris**. Senator, I never saw any unfriendly, contumacious, noncooperative or similar behavior pass between the two of them.

Senator **Eagleton**. Devine, at all times, kept Ms. Cornelius, his Deputy, fully abreast of what was going on in the agency?

Mr. **Morris**. Senator, I do not know what private conversations the two of them may have had, but I do know Ms. Cornelius was a standing member of the same senior policy and senior staff meetings of which I was a member. When the political team, the senior political appointees, in the agency met, Ms. Cornelius met with us as well as Mr. Devine. I know Mr. Devine, in 4 years, never instructed me not to inform Ms. Cornelius of anything.

Senator **Eagleton**. But only to inform her when she asked a specific question?

Mr. **Morris**. That, I think—that relates to my relationship with Ms. Cornelius.

Senator **Eagleton**. Yes.

Mr. **Morris**. This was not Mr. Devine's instruction as to our relationship. It is simply a fact that Ms. Cornelius and I did not often intersect.

Senator **Eagleton**. Did not intersect?

Mr. **Morris**. We did not deal with each other daily. Perhaps——

Senator **Eagleton** [interposing]. She is No. 2 in the agency, you are general counsel. Those are pretty high-up jobs.

Mr. **Morris**. I agree.

Senator **Eagleton**. But you didn't intersect?

Mr. **Morris**. As a practical matter, Ms. Cornelius and I did not deal with each other daily. I reported immediately to the Director on the organization chart.

Senator **Eagleton**. Ms. Cornelius was not, unlike you, selected by Dr. Devine, was she?

Mr. **Morris**. Ms. Cornelius was selected by President Reagan.

Senator **Eagleton**. But you are a Devine protege?

Mr. **Morris**. I was selected and appointed by Mr. Devine.

Senator **Eagleton**. Like Mr. Nesterczuk, he's a Devine person, right? [Laughter.]

Mr. **Morris**. I might take issue with that characterization, too, but Mr. Nesterczuk is an appointee of Mr. Devine.

Senator **Eagleton**. But unlike the Devine inner group, Devine self-picked, Ms. Cornelius came out of Virginia and was not a protege of Dr. Devine's. Isn't that correct?

Mr. **Morris**. Senator, I frankly don't know what the prior relationship——

Senator **Eagleton** [interposing]. She was in the know of what was going on in the agency at all times.

Mr. **Morris**. I am sorry?

Senator **Eagleton**. Ms. Cornelius was really put in the know by Dr. Devine——

Mr. **Morris** [interposing]. I never saw Ms. Cornelius excluded. Therefore, my impression is that Ms. Cornelius was in the know.

Senator **Eagleton**. One final question at this junction, and then I have a couple more. When Ms. Cornelius decided to fire Dr. Devine, he said, "You can't do this." You said it was clear all along that she had all the authority—she could hire, fire, change, modify, alter delegations, run the place, she was really captain of the ship; but when she fires Devine, Devine says, "You can't do this." Where would Devine get that kind of an idea Dr. Cornelius couldn't fire him?

Mr. MORRIS. Perhaps Dr. Devine was speaking to prudence rather than legality.

Senator EAGLETON. Oh. You raised that a couple of times, prudence and legality.

Mr. MORRIS. There is no question. Ms. Cornelius has legal authority.

Senator EAGLETON. My time is up.

Senator STEVENS. Thank you very much.

Mr. Morris, I am going to send you a document. Have you got this in your hand now?

Mr. MORRIS. Yes, sir.

Senator STEVENS. Do you recognize what that is?

Mr. MORRIS. I do, sir. This is a page from Section 2, part 12 of the Administrative Manual of OPM.[1]

Senator STEVENS. I previously discussed this with you. This has on it some writing, it is apparent it was a draft that was apparently just xeroxed to show where it would go into the delegation of authority, is that right? The first four paragraphs are small print; it has the two paragraphs in small print. In the middle is some typewritten authority that has been typed in there on a xeroxed page; would you agree with that?

Mr. MORRIS. Yes, sir.

Senator STEVENS. Did that come from your office? Did it, the original wording, before it was marked up?

Mr. MORRIS. No, sir.

Senator STEVENS. Where did it come from?

Mr. MORRIS. I do not know.

Senator STEVENS. Is any of that writing yours?

Mr. MORRIS. Yes, sir.

Senator STEVENS. What did you write there?

Mr. MORRIS. I wrote the words "investments and delegations of." I wrote the word "to." I wrote the words "are delegated." The circled word "new" in the left-hand margin may be my writing.

Senator STEVENS. So you told me before how beautiful the word "from" was rather than "to." You are the one who changed "from" to "to," aren't you?

Mr. MORRIS. Clearly this is a different instrument. Yes, I wrote the word "to." I deleted the word "of."

Senator STEVENS. Yes, you changed it—the word "from" was typed in there to begin with, then the word "of" and the final word that survived was "to," so you changed it so it reads "All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director," et cetera, is that right?

Mr. MORRIS. Yes, sir.

Senator STEVENS. So, as a practical matter, the final language was yours, wasn't it?

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[1] See p. 512, item 13.

Mr. **Morris**. Well, sir, I don't believe this is identical to the final language. But certainly those words that I wrote are included in the final language.

Senator **Stevens**. "All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may in turn redelegate authority at his discretion." Aren't those the words that are there?

Mr. **Morris**. In the final version?

Senator **Stevens**. Yes.

Mr. **Morris**. Yes.

Senator **Stevens**. So you did write the final version.

Mr. **Morris**. No, sir, I did not.

Senator **Stevens**. Well, isn't the final version the one that appeared on March 25?

Mr. **Morris**. That Mr. Devine signed on March 25, yes.

Senator **Stevens**. Please give him a copy of that. I was just reading from that. That is what I was reading from, the final version.

Mr. **Morris**. I think I can clear up this confusion by making two points. There was another piece of paper that I saw on March 22 which is not in front of me. It included the language describing the position as that of the Executive Director.

Senator **Stevens**. I am trying to find out where the language came from in the March 25 memorandum. It is known now as the item No. 3 in our record here.

Mr. **Morris**. Clearly——

Senator **Stevens** [interposing]. Just a second. The operative paragraph is the one I just read, "All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion." That is the precise language in the document you said you marked up.

Mr. **Morris**. There are a couple of crucial differences. One is that in the document signed on March 25, the title of the position was that of Executive Assistant to the Director.

Senator **Stevens**. Right.

Mr. **Morris**. The document, this document, I marked up on March 22 was a document relating to the position of Executive Director. After I marked up this document on March 22, I never again saw a delegation instrument until I saw a copy of the March 25 instrument and I saw that for the first time on either April 30 or May 1.

Senator **Stevens**. With the exception of the title, they are your words, aren't they? You changed it?

Mr. **Morris**. I am saying, "Yes, I wrote these words and saw them on March 22." I am not sure how to answer that, Senator.

Senator **Stevens**. Have you got March 25 in front of you?

Senator **Cochran**. They just put it beside you, that is what they handed you.

Senator **Stevens**. With the exception of the title, aren't they the same?

Mr. **Morris**. Yes, sir.

Senator **Stevens**. So we can now say the wording of the redelegation was yours, right?

Mr. **Morris**. Very well, yes, sir.

Senator **Stevens**. In terms of that redelegation, did you discuss it with Mr. Devine after it was executed?

Mr. **Morris**. Yes, I did.

Senator **Stevens**. I am talking about between the time it was executed and before the time that the position was abolished, did you discuss it with him?

Mr. **Morris**. Yes, sir, on one occasion, on April 5.

Senator **Stevens**. Where were you then?

Mr. **Morris**. I was in my office.

Senator **Stevens**. Who else was there?

Mr. **Morris**. No one. It was a telephone conversation.

Senator **Stevens**. What was the conversation?

Mr. **Morris**. Executive Assistant Devine telephoned me on Friday, April 5. He said to me words to the effect, "I recall last night at a staff meeting, Joe, you expressed some concern about the legal validity of some Federal Personnel Manual issuances and Federal Register notices that are now appearing in print with my signature on them." I said, "Yes, that's right." He said, "Now, I understand what you were talking about. I didn't understand what you were talking about when you raised the point last night. What's your concern?" I said, "My concern is that although I know that you signed off on these notices and FPM issuances prior to the expiration of your term of office on March 25, it's taking OMB, the Federal Register, and the printing presses, weeks and sometimes months for these things to appear in print and my concern is that there may be a legal challenge to the validity of a rule or a policy guidance issuance because someone will assert that it's the date of the printing of the publication as opposed to the date of the executive action that is controlling." This harkened back precisely to an issue we had discussed in the days leading up to March 20. That is one of the reasons why in my judgment I thought a delegation instrument was an appropriate part of the package creating the position. I said, in the telephone conversation, "Absent the existence of a delegation document, this question is a live one and I have assigned lawyers on my staff to research this question in anticipation of litigation." And Mr. Devine said to me, "Oh, but don't you know, I signed the delegation." I said, "No, I did not know. The last delegation I saw was for the position of Executive Director and that's not your title." He said, "No, the title was changed to Executive Assistant to the Director. I signed the delegation for the position of Executive Assistant to the Director."

Senator **Stevens**. Let's go to that. On March 25, the delegation of authority that was signed was to the position of Executive Assistant to the Director who was the next day the Deputy Director as Acting Director.

Mr. **Morris**. That is correct.

Senator **Stevens**. But there was no Executive Assistant to the Director on March 25, is that correct?

Mr. **Morris**. That's correct.

Senator **Stevens**. You knew that?

Mr. **Morris**. Yes, sir.

On March 25, Mr. Devine was the Director and he signed the delegation of authority to the position of Executive Assistant to the

Director to which he was appointed by Ms. Cornelius, effective the next day.

Senator **STEVENS**. I understand what was done, but at the time he signed it, there wasn't such a position and you knew that.

Mr. **MORRIS**. There was a position, but there was no incumbent in the position.

Senator **STEVENS**. There wasn't a position created until the next day?

Mr. **MORRIS**. The position was created on March 25, but it wasn't encumbered until March 26.

Senator **STEVENS**. I thought it was the other way around. The delegation authority I have in front of me is March 25, and I believe the position was created——

Mr. **MORRIS** [interposing]. If you look at the standard form 52 that was signed by Ms. Cornelius, you will see that she signed it on March 25. It was encumbered then by Dr. Devine the following day. So, as head of the agency, he was delegating authority to a position that was not yet encumbered. By the terms of the delegation instrument, the delegation would not be effective until the position was encumbered.

Senator **STEVENS**. Wasn't effective until March 26. Ms. Cornelius signed it March 25. I stand corrected.

Mr. **MORRIS**. To conclude the telephone conversation, Mr. Devine said, "Oh, don't you know I did sign the delegation as we drafted it, but for the Executive Assistant." And I said, "I see. I think that resolves my legal question about the validity of the post-dated Federal Personnel Manual and Federal Register issuances." We concluded the conversation. I then summoned my staff, the people I had working on the legal research project, and informed them of the existence of the delegation and canceled the research project.

Senator **STEVENS**. I think my time is up.

We will get at that a little later here.

Senator?

Senator **EAGLETON**. Senator Levin?

Senator **LEVIN**. You found out April 7——

Mr. **MORRIS** [interposing]. April 5.

Senator **LEVIN** [continuing]. That this document was in existence. You knew it belonged in your file, the file you maintain that is open to the public, the OGC Index Digest?

Mr. **MORRIS**. Your statement is correct. It did not, however, occur to me on the 5th.

Senator **LEVIN**. It didn't occur to you to get the document that belonged in your own file?

Mr. **MORRIS**. I don't recall that it occurred to me on the 5th. Your point is unexceptionable as to it.

Senator **LEVIN**. Is what?

Mr. **MORRIS**. Unexceptionable.

Senator **LEVIN**. I thought it was a very exceptionable position. Exception, unexceptionable.

Senator **EAGLETON**. Not unexceptionable. [Laughter.]

Senator **LEVIN**. At any rate, you agree with that?

Mr. **MORRIS**. Right.

Senator **STEVENS**. I really don't like afternoon soaps, so let's not start one here, all right?

Senator LEVIN. It didn't dawn on you April 5 you should ask for the document that belonged in your file? In fact, it didn't dawn on you at all until the end of April when this whole thing began to unravel. Is that basically——

Mr. MORRIS [interposing]. Yes, sir, that's correct, because I wasn't surprised by it. It seemed to me to relate naturally to the position that Mr. Devine was exercising in the agency.

Senator LEVIN. Did you ask Devine how that title got changed from Executive Director to Executive Assistant?

Mr. MORRIS. No.

Senator LEVIN. Wasn't there a conversation about that in an earlier meeting with you and Mr. Devine?

Mr. MORRIS. Not with me.

Senator LEVIN. I thought Mr. Hunt told us there was some discussion about that, but perhaps I am wrong. There was no discussion about that prior to your——

Mr. MORRIS [interposing]. When Mr. Devine announced at the staff meeting the morning of Monday, the 25th, that that would be his title, that was the first I learned of it.

Senator LEVIN. At that staff meeting which Senator Eagleton talked about, the meeting where Mr. Devine was very candid about his subsidiary role, and you went through all the things he said, including maybe we ought to change the boxes around, that kind of thing, did he announce at that time that he had been delegated all the authority of the Director and would continue to have that authority?

Mr. MORRIS. I don't recall his using the word "delegated." He certainly said that we would continue to do things around OPM the same way, that things would remain the same. It was unambiguous that he was going to continue to be in charge with respect to the subordinates of Ms. Cornelius and himself. It was also unambiguous that Ms. Cornelius was his superior.

Senator LEVIN. Did he say he had and continued to have all of the authority of the Director of the agency?

Mr. MORRIS. He said that in Don Devine's way, which is to say, "We're going to continue doing these things the same way we always have." I construed that to mean that Don Devine continued to exercise general supervisory authority over personnel of this agency, with the exception of Ms. Cornelius.

Senator LEVIN. Well, don't throw that in with a little minor exception, with the exception he has a new boss and they have a new boss.

Mr. MORRIS. That was never an issue. That was clear.

Senator LEVIN. That is very much the issue.

Mr. MORRIS. But that was clear in Mr. Devine's own statement.

Senator LEVIN. It was clear there was a new boss.

Mr. MORRIS. Yes, sir.

Senator LEVIN. He had a delegation of authority in his possession that said he maintained all the authority of the Director of that agency. Is that not right? He had that in his possession. You didn't have it in your possession?

Mr. MORRIS. To the best of my knowledge, that is correct.

Senator LEVIN. He had it in his possession.

Mr. MORRIS. To the best of my knowledge, that's right.

Senator LEVIN. By the way, I looked up the word "delegation" in Black's Law Dictionary and I don't see any sharing definition.

Mr. MORRIS. Senator, I think it's a very well-understood rule of law that an official with power may delegate it, but by his delegation of the power, he does not extinguish his own claim to that power.

Senator LEVIN. Does he transfer the authority?

Mr. MORRIS. He permits someone else to exercise the authority but not necessarily to the exclusion of himself.

Senator LEVIN. But he transfers the authority to somebody else?

Mr. MORRIS. Yes.

Senator LEVIN. So you will agree, transfer authority is a commonly accepted understanding of the word "delegation"?

Mr. MORRIS. Transferred in the particular sense that does not imply a separation from, or a surrender of, authority.

Senator LEVIN. Mr. Morris, do you know who prepared this memo of March 25?

Mr. MORRIS. Which one, sir? There were several.

Senator LEVIN. Is there another memo of March 25? I thought there was only one.

Mr. MORRIS. There are several and I don't know who physically prepared the typescript of any of them.

Senator LEVIN. Do you think that Ms. Cornelius should have been notified of this delegation?

Mr. MORRIS. Senator, I think Ms. Cornelius should have been informed. Indeed, her consent should have been obtained, for there should have been no such relationship without her consent to the powers and authorities of the position that Mr. Devine would hold. I do not necessarily think that means Ms. Cornelius should have seen all the paperwork attendant upon that because the paperwork attendant upon the creation of the position is often voluminous. In the ordinary course of the business of the agency, a very important policy decision may be made without necessarily all the principals sharing all the paperwork.

Senator LEVIN. There was some paperwork shown the next Monday after, March 25?

Mr. MORRIS. Yes, sir, and that was a unique——

Senator LEVIN [interposing]. I just want to know—there were some papers shown to her, but you say she should have been shown the delegation, in your view, and I guess you acknowledge she wasn't. You concede she wasn't shown the delegation?

Mr. MORRIS. She says, sir, that she was not, and I have no reason to disbelieve her.

Senator LEVIN. And you concede she should have been shown that document?

Mr. MORRIS. No, sir, I didn't say that.

Senator LEVIN. I thought you said that a moment ago.

Mr. MORRIS. I said she should have known and should have consented to the particulars of the relationship. But whether that means she should have seen all the paperwork, I wouldn't say.

Senator LEVIN. Without quibbling, she should have been informed about the existence of that delegation.

Mr. MORRIS. She should have been, and in all candor, I think that she and I and all the other senior officials of our agency knew the reality of the relationship as of that meeting on March 25.

Senator LEVIN. Should she have been informed of the fact that Don Devine delegated authority to himself on March 25, all of the powers of the Director? Should she have been informed of that? It's a simple question.

Mr. MORRIS. She should have been informed of all of the powers that Don Devine was going to have on and after March 26, and I think we all were informed of that. I didn't have any doubt about it. I had a doubt about the existence of a piece of paper because I was concerned about an evidentiary question.

Senator LEVIN. You have no doubt in your mind that she was informed as a practical matter of the fact that all of the authority of the Director had been delegated to Donald Devine?

Mr. MORRIS. With the important caveat——

Senator LEVIN [interposing]. Can you say, "Yes, with the important caveat?"

Mr. MORRIS. Yes, with the important caveat that that was all subordinated to her authority.

Senator LEVIN. You heard Dr. Cornelius this morning, did you not?

Mr. MORRIS. Yes, sir.

Senator LEVIN. She said she was not so informed. Do you doubt her?

Mr. MORRIS. She said she was not informed about the piece of paper——

Senator LEVIN [interposing]. No, she said she was not informed of the fact that Donald Devine delegated all of the authority of the Director to himself. She said that this morning. Do you doubt it?

Mr. MORRIS. Well, that is what I think Don Devine said at the staff meeting on March 25, and Ms. Cornelius was there, as was I.

Senator LEVIN. That he had delegated to himself all of the authority?

Mr. MORRIS. That the governmental reality——

Senator LEVIN [interposing]. My question was that he had delegated to himself all of the authority of the Director. Is that what he said at that staff meeting?

Mr. MORRIS. Are you asking did he use those words?

Senator LEVIN. No, the substance of what he told the staff meeting was he had delegated to himself all the authority of the Director after March 25. Is that the substance of what he told the staff?

Mr. MORRIS. Words, no; substance, yes, with the impression of Ms. Cornelius' consent.

Senator LEVIN. That is the substance of what he disclosed to the staff at that meeting?

Mr. MORRIS. Yes, sir.

Senator LEVIN. You indicated there were two other times that you knew of the existence of this document before April 30? One was on April 5 in your conversation with Devine, and you didn't get a chance to give us the other two instances.

Mr. MORRIS. Instances when I knew of the existence? I learned of it on April 5.

Senator LEVIN. You said there were three instances between March 25 and the time it became public when there were discussions about that document. You gave us one instance, April 5, a conversation between Mr. Devine and yourself when you failed to ask for a copy for your file which you are supposed to maintain for your public.

Mr. MORRIS. I might add that I believe Mr. Devine was not in the office on April 5, which may explain why I didn't trundle down to his room to look for a copy.

Senator LEVIN. Was he there between the 5th and the 30th?

Mr. MORRIS. To be sure.

Senator LEVIN. So that explains why you didn't trundle down——

Mr. MORRIS [interposing]. No, but will you explain it——

Senator LEVIN [interposing]. Let's go back to the second and third instances.

Mr. MORRIS. May I respond to that point since you asked me about it? My concern for that piece of paper was as an evidentiary issue. I was concerned that I would need it in subsequent litigation in order to vindicate an OPM rule. I was concerned about protecting the agency. I wasn't concerned about protecting Donald Devine, I wasn't concerned about protecting Loretta Cornelius. I was concerned about protecting the agency. Until I needed that paper for evidentiary reasons, it wasn't at the forefront of my mind. I saw it as a minor, incidental part of the paper transaction that created the public reality of Don Devine at the helm.

Senator LEVIN. Whether or not the duties of the Acting Director of the agency are minor and routine is very dubious, in my mind. I think it is critical, but let's not argue about that. Second and third instances where you discussed that document before it became public.

Mr. MORRIS. The first instance was with my staff on April 5 when I informed members of my staff of the existence of the delegation. I didn't think it was a secret. I said, "Hey, there is a delegation. We don't need to continue this research. We have that if we ever need it." The second occasion was on the afternoon of April 29. Ms. Cornelius had her office call my secretary and schedule an appointment at 2:30 in the afternoon. I met with her at 2:30 in the afternoon, and she asked me to explain to her about the delegation system, and the like, and asked me to describe for her the legal foundations of Mr. Devine's position as Executive Assistant.

Senator LEVIN. Your testimony before was there were three occasions you discussed publicly the existence of that document. Now you are telling me one was with Mr. Devine on the phone, and he may not have been in the office. Two was with your staff. Three is——

Mr. MORRIS [interposing]. One was with my staff on April 5. We exclude Mr. Devine. The second was with Ms. Cornelius. The third was when I actually put my hands on the pieces of paper on April 30 or May 1.

Senator LEVIN. You call those public disclosures?

Mr. MORRIS. I wasn't keeping it a secret. The only people who seemed to be interested in the question I talked to about it. I did not hold it in my vest pocket. I did not know it was a secret. I did not treat it as a secret. With the only people with whom I had occasion to discuss the matter, I discussed it freely.

Senator LEVIN. The Position Description of Executive Assistant to the Director lays out the duties of the Executive Assistant to the Director?

Mr. MORRIS. That is the key document, yes, sir.

Senator LEVIN. Does the delegation of authority in any way change, modify, abbrogate, affect, amend that position?

Mr. MORRIS. No, the delegation is subordinate to, and in implementation of, the——

Senator LEVIN [interposing]. So you, as a lawyer, are telling us that words "Under the direction of the Deputy Director," the Executive Assistant will have A, B, and C duties is the same thing as the Executive Assistant to the Director has delegated to him all of the authority of the Director? You are saying that is your best judgment as a lawyer?

Mr. MORRIS. I'm telling you more than that.

Senator LEVIN. But are you telling us that?

Mr. MORRIS. I'm telling you that and that in the event of a conflict, the Position Description is intended to inform and control the delegation. That, by the way, is the nature of our Administrative Manual system which contains on its own terms the principle that there will be periodic reorganizations and redefinition of position descriptions and from those changes should flow the changes in the Administrative Manual.

Senator LEVIN. My last question is a follow-up of Senator Stevens' question about that term "from." You indicated it was such a critical word in the first draft that you saw and you pointed to it and said, "That is the critical word, 'from,' it is a delegation of authority from the Director." Senator Stevens asked you about this. I, frankly, didn't understand your answer. You were so critical to have that as "from" in the first draft, and that justified the delegation, in your view, relative to that draft. You seized on that word. Why, in heaven's name, did you change the word "from" to "to," the exact opposite, in the final draft?

Mr. MORRIS. I did not delete the word "from" in that manuscript. It had already been changed to the word "of."

Senator LEVIN. You wrote the word "to" in there.

Mr. MORRIS. Given the grammar of the sentence as it was retyped there, to make sense instead of——

Senator LEVIN [interposing]. But "from" made great sense. You didn't put the word "from" back in. Why is it such a critical word?

Mr. MORRIS. Because this made grammatical sense as it was rewritten.

Senator STEVENS. Time's up, Senator.

Senator LEVIN. Thank you.

Senator STEVENS. Thank you. You said on several occasions that you discussed this delegation of authority freely and told us about one time you discussed it. As a matter of fact, one time you said there were three specific times you discussed the delegation of authority. When were the other two times, at least, that you discussed the delegation of authority?

Mr. MORRIS. On the telephone with Mr. Devine on April 5, with my staff on April 5 and with Ms. Cornelius on April 29.

Senator STEVENS. So really you discussed it once between the time it was executed on March 25 and the time that you had discussed it with Dr. Cornelius on April 29, is that right?

Mr. MORRIS. Correct. I discussed it once between March 25 and April 29.

Senator STEVENS. Do you know where the delegation of authority was in the interim period?

Mr. MORRIS. Of my personal knowledge, I do not know.

Senator STEVENS. Normally, if there is a delegation of authority signed, don't you approve it as the general counsel?

Mr. MORRIS. I approve it at the front end of the process rather than at the conclusion. Under the Administrative Manual, I would do with any delegation of authority exactly what I did in this case, prepare documents and transmit them to the Associate Director. Under the Administrative Manual, the Associate Directors have responsibility for carrying them forward to the Deputy Director or the Director.

Senator STEVENS. But you did not get a copy of this back at any time prior to the time Dr. Cornelius asked you about it, is that right?

Mr. MORRIS. That is correct.

Senator STEVENS. Dr. Cornelius testified that she asked you to come to her office to discuss her legal authority. Do you recall that?

Mr. MORRIS. Yes, sir.

Senator STEVENS. And did she ask you to explain the legal relationship between her authority and that which Dr. Devine had?

Mr. MORRIS. No, she asked me to explain Dr. Devine's authority.

Senator STEVENS. What did you tell her?

Mr. MORRIS. I told her that Mr. Devine's authority as Executive Assistant was grounded in several instruments: Position Description, delegation of authority, line of succession, et cetera. They were not in my custody. I believed they were in the custody of Bill Hunt. I referred her then to Mr. Hunt. I described in general terms what generically each of these kinds of documents is and then how they relate to the Administrative Manual system.

Senator STEVENS. Did you tell her specifically about the delegation of authority then?

Mr. MORRIS. I told her that I thought there was a delegation of authority.

Senator STEVENS. And what it did. What did you tell her?

Mr. MORRIS. I did not detail the delegation of authority. I simply told her I thought it existed and that it spelled out the authority formally delegated to Mr. Devine and I told her where I thought it reposed.

Senator STEVENS. Did you attend staff meetings that were held between the time Dr. Devine's term expired and the time that he left the position of Executive Assistant?

Mr. MORRIS. Yes.

Senator STEVENS. Did you ever bring up the question of delegation of authority there? Did you inquire if it had been signed?

Mr. MORRIS. No, I brought up a related question which was the question of the evidentiary problem of how we could prove up the validity of Federal Register and Federal Personnel Manual issuances that were printed on dates subsequent to the end of Mr. Devine's term. How will we establish that? I asked that question on at least two occasions in staff meetings. One such comment prompted Mr. Devine on April 5 to phone me to discuss that point. Then he understood that the question I was asking could be answered by the existence of the delegation instrument.

Senator STEVENS. You didn't tell us before but that was the time you found out about the delegation, wasn't it, on that telephone call?

Mr. MORRIS. I learned that it had been signed from Mr. Devine by telephone on April 5.

Senator STEVENS. But this is the same telephone call you are talking about now, the time before?

Mr. MORRIS. It is the only one, yes, sir.

Senator STEVENS. But when else did you discuss the relationship, as you understood it, the delegation of authority? Any other time between the time of March 25 and the time that Dr. Cornelius asked you to come to her office?

Mr. MORRIS. To the best of my recollection, no. There were three occasions.

Senator STEVENS. We asked for a listing of the documents that the Executive Assistant to the Director signed, during the time that there was an Acting Director. Did you help prepare that response to my request?

Mr. MORRIS. Yes, sir.

Senator STEVENS. Were any of those actions published during the period you talked about?

Mr. MORRIS. Yes, sir. I'm sorry, excuse me——

Senator STEVENS [interposing]. My list shows—and I will put this whole thing in the record just so we know about it. It is going to be document No. 14. It shows there were a series of documents, OPM action documents, between March 25 and May 3 that were final actions taken by DJD—I assume that is Dr. Devine—only. And that means they would be published in the record as being a final action of the agency under the authority of the Executive Assistant to the Director.

Mr. MORRIS. Senator, forgive me. I may have misanswered your last question. None of the seven final actions that Mr. Devine took between March 26 and May 3 resulted in publications in the Federal Register or the Federal Personnel Manual system. He did sign final agency actions on or before March 25 that were published in either the Federal Register or FPM system bearing dates subsequent to the expiration of his term of office. That was my concern, and it focused on the delegation.

Senator STEVENS. Let me review these. These items included two pieces of correspondence, including a letter to Mrs. Reagan, an authorization for internal emergency hiring authority. That is a legally binding document of the agency, is it not?

Mr. MORRIS. Yes, sir.

Senator STEVENS. Did you inquire at the time as to the authority of the Executive Assistant to the Director to sign that document?

Mr. MORRIS. No, I thought it was rather peculiar that it was sent to him for action because it was an internal agency approval. My understanding was that previous such grants of emergency authority were normally handled at the level of the Associate Director for Administration and below him. It had already been subdelegated below Mr. Devine's level.

Senator STEVENS. Without a delegation of authority, the Executive Assistant to the Director would not have the authority to be the final approving person for the agency, would he?

Mr. MORRIS. That's probably correct; yes, sir.

Senator STEVENS. You are general counsel. Did you 'inquire at the time that was signed?

Mr. MORRIS. I didn't see it at the time it was signed, Senator.

Senator STEVENS. All right, we have another, Quarterly Report on External Awards Activity. Then, an approval of recommendation by the general counsel concerning his intervention in a case before the Merit Systems Protection Board. Now that originated with you?

Mr. MORRIS. Yes, sir.

Senator STEVENS. It went to Dr. Devine for the agency approval, not to the Acting Director. Why?

Mr. MORRIS. Again, Senator, this was an action which normally I would have taken on my own. What I had decided in this matter——

Senator STEVENS [interposing]. I only have so much time. Tell me why did you give it to Dr. Devine instead of Dr. Cornelius?

Mr. MORRIS. Because I previously discussed the subject matter with Dr. Devine and I was aware of his interest in the matter and I was aware of his authority.

Senator STEVENS. Were you aware of his authority at that time?

Mr. MORRIS. I believe that I was.

Senator STEVENS. The delegation of authority had been disclosed to you at that time?

Mr. MORRIS. If it had not, I was certainly aware of his substantive authority within the agency.

Senator STEVENS. You are the general counsel and this is a legal document authorizing you to intervene.

Mr. MORRIS. All right, let me find the date. The document was approving my determination not to seek judicial review, approving my inaction rather than my action. Normally, I didn't seek approval for my inaction.

Senator STEVENS. Well, why did you do it this time?

Mr. MORRIS. Because I thought it was particularly important.

Senator STEVENS. So you went to the Executive Assistant rather than to the Acting Director?

Mr. MORRIS. That's right. Rather than do nothing at all, rather than make the decision on my own which I was authorized by my delegations of authority to do. He signed on April 2 and at that time, I was not aware of the existence of the delegation.

Senator STEVENS. But you presented it to him anyway?

Mr. MORRIS. I did.

Senator STEVENS. The other one is the authorization for early-out retirements of the Small Business Administration. Did you approve that document before it went to Mr. Devine?

Mr. MORRIS. Yes, but I believe I approved it well before March 25.

Senator STEVENS. This is signed by Dr. Devine on April 4 as Executive Assistant to the Director?

Mr. MORRIS. Now, I note it was transmitted to him by the Deputy Associate Director for Staffing on March 18 and I probably would have given it my review prior to March 18.

Senator STEVENS. Do you have a surname route sheet so that we could know when these things went through your office or someone else's office? The documents you gave us don't show the routing sheet.

Mr. MORRIS. There probably does exist such a routing sheet. It would be in the custody of the originating unit within the agency.

Senator STEVENS. Well, that certainly is a legal document that has tremendous impact on the Government, wouldn't you say?

Mr. MORRIS. Yes, Senator, and my point——

Senator STEVENS [interposing]. Was that published?

Mr. MORRIS. No.

Senator STEVENS. Isn't that the kind of document that was required to be published, approval of the Small Business early-out concept?

Mr. MORRIS. No, sir. When we approve it, we simply transmit a notice of the approval, usually by letter, to the agency.

Senator STEVENS. I have put this whole document in the record.[1]

I find it very difficult to understand your relationship with this process, Mr. Morris, in terms of your duties to the principals who are charged by the Government to manage this agency. I think without a delegation of authority, Mr. Devine—which he knew about and had no reason to question unless you raised some question. I don't see why you didn't raise a flag for somebody.

Mr. MORRIS. Because, Senator, after that staff meeting on March 25, I thought I had a very clear understanding of what Mr. Devine's authority in the agency was.

Senator STEVENS. Let's go into that. You have a staff meeting and Mr. Devine says, I didn't get confirmed yet, but I'm going to be around here and I'm going to be Executive Assistant to the Director, and everybody knows that we ought to keep going the same way we have in the past. Right?

Mr. MORRIS. Right.

Senator STEVENS. Not one word of delegation of authority mentioned, as such, in that meeting, right?

Mr. MORRIS. Correct.

Senator STEVENS. But you as general counsel were sure that all of the employees, including the new Acting Director, knew the authority of Dr. Devine, is that right?

Mr. MORRIS. That is correct.

Senator STEVENS. Any further questions, gentlemen?

Senator COCHRAN. I have some questions, but I yield to the Senator from Maryland.

Senator STEVENS. Senator Mathias.

Senator MATHIAS. Mr. Chairman, I wonder if Mr. Morris could tell us—you said that you, in the light of your working relationship with the Deputy Director, would not presume to volunteer any legal advice to her. Is that correct?

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[1] The document, marked item No. 14, may be found in the committee files.

Mr. MORRIS. No, sir, I said I would not presume to intrude upon her relationship with Mr. Devine.

Senator MATHIAS. But I think you also said that you wouldn't offer her any advice unless she asked for it?

Mr. MORRIS. Senator, I did not say that. What I said was that the reality of my relationship with Ms. Cornelius was essentially that I normally came to her when I was called. I didn't have either a habit of meeting with her frequently informally or standing arrangements to meet with her privately.

Senator MATHIAS. However that may be, the long and short of it is, you did not go to her and say there has been a delegation of authority about which you should know. Is that correct?

Mr. MORRIS. That is correct and the reason was because I thought she knew.

Senator MATHIAS. Did you ever advise Mr. Devine that in your opinion, in your legal opinion as general counsel, the Deputy Director should be advised?

Mr. MORRIS. No, sir, because I was given to understand by Mr. Devine that Mr. Devine intended to discuss precisely the nature of his position with Ms. Cornelius and I never saw anything to contradict that indication.

Senator MATHIAS. Did you ever see anything that would indicate—let me put it a little bit differently. You said that Mr. Devine's status was no secret?

Mr. MORRIS. Yes, sir, that's correct.

Senator MATHIAS. You stated that he personally described the substance of the situation at a staff meeting?

Mr. MORRIS. Yes, sir.

Senator MATHIAS. Can you tell us what were the outward and visible signs of the situation? What about offices?

Mr. MORRIS. At the staff meeting you mean?

Senator MATHIAS. No, in the headquarters. Did Mr. Devine move out of the office of Director, did Ms. Cornelius move into it? What was the physical situation? Did the visible signs make it clear? You say it was no secret. Just how clear was it?

Mr. MORRIS. Well, with respect to rooms, Ms. Cornelius occupied the room of the former director and Mr. Devine already occupied the room of the former Deputy Director. They reversed the order of rooms in the executive suite when this administration started, so in my judgment Ms. Cornelius has always had the better office so there was no trade of offices.

Second, they both had identical cars and driving privileges.

Senator MATHIAS. I am not looking to your real estate judgment now, I am asking what actually happened at the headquarters. Did Mr. Devine move out of the office he occupied as Director?

Mr. MORRIS. There were no physical relocations.

Senator MATHIAS. So there were no outward and visible signs that would give notice to anybody?

Mr. MORRIS. That Ms. Cornelius was in charge?

Senator MATHIAS. That's right.

Mr. MORRIS. The crucial change was in the paper flow. [Laughter.] We are talking about a bureaucracy and it's the paper flow that counts. She then came into the position of the paper flow where the boss comes; Mr. Devine then came in the position of the paper flow where the subordinate comes. In the bureaucracy that is the most important outward sign.

Senator MATHIAS. Those are the only outward and visible signs.

Mr. MORRIS. I am sure there are others. We started referring to Ms. Cornelius as Acting Director and changing the way we referred to Mr. Devine and the like.

Senator MATHIAS. Did that tend to confuse the situation or did that tend to make clear that in fact the delegation had occurred?

Mr. MORRIS. Senator, I can't answer that. I was never confused. I don't know what the implications were for others.

Senator MATHIAS. Have you ever had a situation like this referred to you as general counsel—a situation that arose somewhere out in the bureaucracy, out in the field?

Mr. MORRIS. I have had occasion to see situations where there were very full delegations of authority, to non-Presidentially appointed officials. That does happen elsewhere in the bureaucracy. For example, at the Merit Systems Protection Board, another Civil Service Reform Act agency, the managing director holds, by delegation, all management authority over the entire agency.

Senator MATHIAS. Did those arrangements have your approval as general counsel?

Mr. MORRIS. No such arrangement was ever presented to me for my approval before.

Senator MATHIAS. Would you have approved it?

Mr. MORRIS. At the Merit Systems Protection Board?

Senator MATHIAS. Anywhere?

Mr. MORRIS. Yes.

Senator MATHIAS. If it occurred without the knowledge of the parties who had a legal right to be informed?

Mr. MORRIS. I would never approve it without the knowledge of the parties who had a legal right to be informed and I submit again that it was my understanding that all the relevant parties in this case were informed.

Senator MATHIAS. But now you find out that they weren't?

Mr. MORRIS. Well, now I find out that some of the parties have some reservation about it.

Senator MATHIAS. It may be late but you now have found out the parties most needing to be informed had not been informed, right?

Mr. MORRIS. Senator, I thought——

Senator MATHIAS. Not what you thought. We need to get the facts. You now find out the parties who should have been informed were not?

Mr. MORRIS. Senator, I refrain from drawing that conclusion. I think we were all informed.

Senator MATHIAS. Then you are saying Dr. Cornelius has not testified truthfully to this committee?

Mr. MORRIS. No, Senator——

Senator MATHIAS. There are no two ways about this. It has to be one way or the other.

Mr. MORRIS. If Ms. Cornelius said she never saw the delegation instrument, I have no reason to doubt it. But I don't think Ms. Cornelius said she didn't hear Mr. Devine tell the whole world what his authority was and what his standing was in the agency because I heard it and it was unambiguous; he was subordinate to her and superior to all the rest of us. I had no doubt about it. I don't think anybody else in the agency had a doubt about it. I don't think anybody on the Hill had a doubt about it.

A press release was issued to the news media the day it happened saying she was in charge. There is an outward sign; I am sorry I neglected to mention that one. A news release was put out to the media saying that Loretta Cornelius was in charge and Don Devine is staying onboard on the payroll as No. 2 in the agency, assisting her in overall policy and administration.

Senator MATHIAS. And did that press release say he had been delegated all the authority of the Director?

Mr. MORRIS. No, sir, because press releases, unfortunately, are not written by lawyers. [Laughter.]

Senator STEVENS. Senator, I am sorry to say your time is up.

Mr. Morris, it is just unfortunate President Nixon didn't have you as Attorney General.

Mr. MORRIS. I agree. History would be very different if he had. [Laughter.]

Senator EAGLETON. I think you would be the second coming of Deep 6.

Mr. MORRIS. Well, I'm not John Dean.

Senator EAGLETON. You are the hide-and-go-seek memo man.

Let's talk about how you published this, Mr. Morris, because you said time and again to Senator Levin you were really concerned about protecting the agency, you were worried about litigation and this little piece of paper, you are worried about this little old piece of paper because you are really concerned about the agency, gung-ho agency. So let's take up—pass out the press release, the very press release [1]——

Mr. MORRIS. I have a copy.

Senator EAGLETON. Mark Tapscott release. Is Tapscott around here? He has been here most of the time. Has he disappeared? This is one of Tapscott's releases. This is the one you were talking about to Senator Mathias. It says, title: "Cornelius Becomes Acting Head of OPM" and it says, quoting Ms. Cornelius, "I look forward to the duties of chief executive officer during this interval. To assist me in my role, I have asked Dr. Devine to be my executive assistant." and goes on, so and so, I ask OPM—and it is about eight lines long. Plenty of room on that piece of paper for one more paragraph; it could have said, by the way, we wish to inform you that all of the duties of the Director have been transferred from Donald Devine, ex-Director, to Donald Devine, Assistant to the Acting Director. One more sentence on a big long plain piece of paper not only would have informed the public, it would have protected you against this litigation that you worry about. It would have been up forward, out front telling everybody, including potential challengers in the litigious arena, just what was going on in the agency and you would have been in conformity with and not in violation of the Freedom of Information Act, 5 USC, 552 Sub-A, Sub 2.

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[1] See p. 513 item 15.

Second, you could have had another rider. In addition to being honest in the press release—it doesn't come out of the general counsel's office—you have an obligation under the Freedom of Information Act to file the document in the OGC Index, but you didn't do it. You weren't worried about protecting against litigation on March 26. You only got worried about it on May 3 when the cat was out of the bag. Then you got interested about litigation. Then you started worrying about all of the Devine orders that were in the Federal Register, then you got worried about some of the things that Senator Stevens has inquired about after the fact, 5 weeks after the fact you got worried about litigation, what have you. Because you wanted to remain silent up to that time, you wouldn't tell Dr. Cornelius, you wouldn't tell her unless she specifically asked you, you weren't going to tell anybody because you and Devine had cooked this up.

Now look at this piece of paper that Senator Stevens handed to you. The word "from" was in the paper. The word "from" made grammatical sense in the paper. It was changed by somebody to "of," you changed it to "to." You could have changed it back to "from." It would have made the same literal or illiteral sense, yet your word "from" disappeared and your handwriting, as you described, becomes the substantive handwriting of this document. You said all the preparation for this stuff had been done by Hunt and Devine. They called you into the room on March 22, the little old lawyer with the briefcase, and they had done all the work.

Now whose handwriting, if you know, is on that paper in addition to yours?

Mr. MORRIS. That is the handwriting of Donald J. Devine.

Senator EAGLETON. So Donald Devine in addition to you; you are the two writers of this document. Anybody else's handwriting you discern?

Mr. MORRIS. Someone did the typescript. I did not draft the typescript.

Senator EAGLETON. Somebody typed it?

Mr. MORRIS. Somebody provided the language in the typescript. That is not mine.

Senator EAGLETON. The handwriting inserts that become the final language in the March 25 memo, the handwriting of Morris and Devine, right? You hatched up this whole thing, you are chief instigator, your handwriting and Devine's, yes or no?

Mr. MORRIS. What is the question?

Senator EAGLETON. Is it your handwriting and Devine's handwriting on the document Senator Stevens tendered to you?

Mr. MORRIS. That is right, our handwriting.

Senator EAGLETON. And the handwriting on the document becomes the text of the final document. You have been through that route with Senator Stevens?

Mr. MORRIS. That's right.

Senator EAGLETON. So you had significant and substantial input into the formulation of that document on March 25?

Mr. MORRIS. That's right.

Senator EAGLETON. And you did not file that document in the OGC Index Digest and thus comply with the Freedom of Information Act?

Mr. MORRIS. The OGC Index Digest is not a Freedom of Information Act system of records.

Senator EAGLETON. Did you file it anywhere in compliance with the Freedom of Information Act?

Mr. MORRIS. I was not responsible for filing it anywhere. The general counsel is not the repository.

Senator EAGLETON. Who was responsible? You are the chief warrior who wants to keep them in compliance with the law. You are worried about litigation, you are worried about that piece of paper that might lead you to trouble in terms of litigation. Where did you think it ought to be filed and by whom?

Mr. MORRIS. I thought it ought to be filed in the records of the Associate Director for Administration.

Senator EAGLETON. So Mr. Hunt messed up, is that right?

Mr. MORRIS. I don't know, Senator, how to deal with a characterization like that. They weren't there.

Senator EAGLETON. You thought Hunt had done the job and in fact he had not.

Mr. MORRIS. Yes, that appears to be the case.

Senator EAGLETON. Appears to be the case.

Mr. MORRIS. And by the way, Senator, I will not say that his failure to have it on his file within 30 days makes it a violation of the Freedom of Information Act.

Senator EAGLETON. If you were worried about this litigation and proper and timely notice and publication of what was going on in the agency so as to make Devine's orders and directives postmidnight March 25 legal, why didn't you see to it the public notice was given so that in fact you could save yourself any challenges in litigation by holding it secretive and removed from public scrutiny?

Mr. MORRIS. One, I learned about it on April 5 and not until April 5. Two, it was my belief on and after April 5 that it was a public document, that it wasn't hidden, and that if I ever wanted or needed it, I could have a copy of it. Nobody ever told me otherwise and I never acted on the assumption otherwise. Indeed, I told my staff I thought it existed. I thought it existed and we could have it and at the time I told Ms. Cornelius I thought it existed and I told her where I thought she could find it.

Senator EAGLETON. It was just there all the time but just nobody knew where to look or where it was. It was just there. Hunt messed up, supposedly in Hunt's file.

Mr. MORRIS. Senator Eagleton, that's right.

Senator EAGLETON. You were worried about litigation and all the time one guy had it, Don Devine.

Mr. MORRIS. It was there and he didn't tear it up and he didn't burn it. If it were going to be this big a problem, why didn't he tear it up or burn it? Because it was an innocent document.

Senator EAGLETON. Well, if it was so innocent, why was it treated like a top secret CIA document?

Mr. MORRIS. It was treated like a boring piece of paper because everybody in town, including you, Senator, knew the reality.

Senator EAGLETON. Dr. Cornelius didn't know. [Laughter.] She's your boss. By the way, does she have authority now to fire you?

Mr. MORRIS. This instant.

Senator **Eagleton**. Ms. Cornelius—[laughter]—strike a blow for freedom—[laughter]—I will wrap up.

Senator **Stevens**. Does Senator Levin have any more questions?

Senator **Levin**. I do.

Senator **Eagleton**. I have three more.

Mr. Morris, why did you not as general counsel inform Dr. Cornelius that to make the SES limited emergency appointment, she had to make a finding in writing that there was a bona fide unanticipated and urgent need?

Mr. **Morris**. I gave that advice to Mr. Hunt and to Mr. Devine in the package of materials that I transmitted on March 20. I put that advice in the pipeline. It was on my checklist.

Senator **Eagleton**. You gave that advice to Hunt so if it was not followed, did Hunt mess up again? [Laughter.]

Mr. **Morris**. Senator, I don't know what happened to my checklist. As I say, I gave the package initially to Mr. Devine. Mr. Devine asked me to turn the package over to Mr. Hunt, and that was done. I gave them a checklist of things to do to create an SES position for Mr. Devine.

Senator **Eagleton**. Why didn't you advise Ms. Cornelius then, Mr. Hunt?

Mr. **Hunt**. On the day in question, as I think I mentioned earlier, I wasn't in town that week so I didn't even have a chance to see Ms. Cornelius until I returned the following week. I might also add, the position during the first term, the first transition back in 1981, was handled at that time by Acting Director Arch Ramsey basically the same way, and that the agency, OPM the agency, through the chairman of the Executive Resources Board, transmits a request for a slot to OPM the institution, in this case the Assistant Director for Executive Administration under which executive personnel is housed.

Senator **Eagleton**. You now know—you also heard from Mr. Morris—if Dr. Devine is appointed again to an SES emergency position, it has to be done in writing, right?

Mr. **Hunt**. Yes.

Senator **Eagleton**. Henceforth whenever he denies a point, let's do it in writing.

Mr. **Hunt**. From what I can tell, this was appropriate documentation the way it was already drafted.

Mr. **Morris**. Mary Rose's memorandum of March 25 to Mr. Nesterczuk approved the creation of the slot. She issued the memo under her delegation of authority to make precisely that determination.

Senator **Eagleton**. It was still not done in compliance with the law. What about this one, Mr. Morris? Did you know that the OPM Manual, section 12.203, titled Submission, requires all delegations of authority to be explained in a memorandum to the Deputy Director, and this is true even when there is a Director?

Mr. **Morris**. And the submission requirements of the Administrative Manual further require that that submission to the Deputy Director is to be made through the Associate Director for Administration and I gave my gobbledygook to the Associate Director for Administration.

Senator **Eagleton**. That is Mr. Hunt again?

Mr. MORRIS. That is Mr. Hunt again.

Senator STEVENS. That is not quite true, you saw it later and revised it.

Mr. MORRIS. And handed it back to Mr. Hunt.

Senator STEVENS. He wasn't there.

Mr. MORRIS. He was in the room on March 22.

Senator STEVENS. At the time Dr. Devine was marking up those documents, he was there?

Mr. MORRIS. Yes, the three of us were together on March 22.

Senator EAGLETON. So if Ms. Cornelius didn't get this in writing as the Manual requires, this was Mr. Hunt's fault?

Mr. MORRIS. Senator, I am not going to draw that conclusion.

Senator EAGLETON. You agreed Ms. Cornelius under the Manual was to get this in writing?

Mr. MORRIS. And it was to be transmitted to her by the Associate Director for Administration.

Senator EAGLETON. If she didn't get it, that Associate Director for Administration goofed?

Mr. MORRIS. Well, I would ask him why it didn't happen and he won't be able to tell you that the general counsel advised him not to do so.

Senator EAGLETON. What happened there?

Mr. HUNT. As I mentioned earlier, the material was provided as requested by the Director at the time to be given to him for his discussion with Ms. Cornelius on Monday, March 25 at which time they were going to reach whatever agreements necessary to handle this transition.

Senator EAGLETON. So you passed the relevant material on to Mr. Devine?

Mr. HUNT. At his request, yes, sir.

Senator EAGLETON. You take care of that chore?

Mr. HUNT. That certainly was the understanding.

Senator EAGLETON. You fulfilled that legal obligation.

Mr. MORRIS. Senator——

Senator EAGLETON. I am talking to Mr. Hunt.

Mr. MORRIS. I'm sorry.

Senator EAGLETON. Then apparently Devine forgot about it, but we will hear about that. But it slipped his mind. Did he later tell you it slipped his mind or he forgot about it?

Mr. HUNT. On the morning of April 30 when I went to retrieve copies of the documents at the request of Ms. Cornelius, I asked didn't you discuss these with her, and he looked and said, no, and he really didn't. I guess he had forgotten, he was busy.

Senator EAGLETON. I'm through.

Senator STEVENS. Senator Levin, do you have anything further?

Senator LEVIN. I do.

Senator STEVENS. We owe you some time, go ahead.

Senator LEVIN. Thank you, Mr. Chairman.

What is the administration you referred to in that same sentence Senator Eagleton read from, 12.203?

Mr. MORRIS. That is the unit within the Office of Personnel Management headed by Mr. Hunt and it is responsible for internal management of our agency and includes such matters as personnel, budget, space, and the like.

Senator LEVIN. Are you a member of that group?

Mr. MORRIS. I am not.

Senator LEVIN. Did you advise Mr. Hunt that the covering memorandum and the change in the delegation of power should go to the Deputy Director as required by rule 12.203?

Mr. MORRIS. Senator, I did not do that.

Senator LEVIN. He is not a lawyer, you are.

Mr. MORRIS. I'm sorry.

Senator LEVIN. He is not a lawyer. You are general counsel as I understand it.

Mr. MORRIS. But he is the master of his operational routine. It is not a legal requirement. Section 12.203 is not a legal requirement enforceable outside the agency; it is an operational routine within the agency.

Senator LEVIN. You both are saying that no time before April 30 did either of you ask Mr. Devine whether or not he had discussed this delegation with Dr. Cornelius. Are you both saying that? First Mr. Morris.

Mr. MORRIS. Senator, would you please repeat the question.

Senator LEVIN. Are you saying that prior to April 30—make it April 28 because I am not sure of the days—prior to April 28 you had no dicussion with Mr. Devine about whether or not he in turn had discussed this delegation issue with Ms. Cornelius?

Mr. MORRIS. I recall no such discussion with Mr. Devine prior to April 29.

Senator LEVIN. Mr. Hunt?

Mr. HUNT. The only instance that I mentioned earlier I can recall is shortly I think after the week of my return from that vacation trip, I asked about where the documents were and I was told—this was to Dr. Devine—and he said he had them. At that point I did not ask. I assumed whatever they were, they were discussed because that is what really the understanding was. At the time, things were rather busy there and I assumed he was involved in the reconfirmation process. The only other time the issue came up at all is when I mentioned it, April 30.

Senator LEVIN. So you assumed he carried out what he said he would do, is that correct?

Mr. HUNT. That's correct.

Senator LEVIN. Mr. Hunt, you have an obligation under law here to submit the change in the delegation to the Deputy Director and Dr. Devine said he would take care of that for you.

Mr. HUNT. Yes, sir.

Senator LEVIN. Now back to you, Mr. Morris. You indicated that there was a staff meeting at which the staff understood the substance of what Mr. Devine was saying was that he had delegated to himself all of the authority of Director. You said that before under oath, that that was the substance of what he said that day to staff. My question is this, who was at that staff meeting, how many people, can you identify them for us?

Mr. MORRIS. Senator, you characterized my testimony with the important emphasis on the words "he" and "himself."

Senator LEVIN. I was very careful before when I asked you was that the substance of what he said at the staff meeting and you said yes, that was the substance, that he had delegated to himself—

Mr. Morris [interposing]. The substance of what he said was that this kind of authority was reposing in him. I cannot tell you that he drew out at the staff meeting that he was the author of the instruments achieving this delegation because there wasn't a discussion of paperwork at the staff meeting.

Senator Levin. It was not the substance of his comment at the staff meeting that he had delegated authority to himself; he simply said I have all the authority of the Director.

Mr. Morris. But with the important caveat subordinate to Ms. Cornelius. Other than that, business as usual. Other than Ms. Cornelius, he was in charge.

Senator Levin. "I have all the authority of the Director."

Mr. Morris. He did not use those words.

Senator Levin. The substance.

Mr. Morris. That is the substance of what he said. I have all the authority of the Director subordinate to Ms. Cornelius.

Senator Levin. How many people were at that staff meeting, roughly?

Mr. Morris. Roughly 12.

Senator Levin. Can you identify them for us?

Mr. Morris. I was there, the general counsel; James Byrnes, the deputy general counsel was there. Associate Director George Woloshyn was there; Associate Director Terry Culler was there; Associate Director James Morrison was there; Executive Assistant Director Patrick Korten was there; Assistant Director Mark Tapscott was there; Principal Assistant George Nesterczuk was there; Assistant Director Mary Rose was there; Assistant Director Robert Moffit was there; Deputy Associate Director Henry Curry was there; and Don Devine was there. Aside from me, the number was 12.

Senator Levin. Mr. Hunt, a question or two. There was a discussion of delegation of authority prior to the time documents were given to Ms. Cornelius, whatever documents were given to you. You were in a discussion with Mr. Devine and Mr. Morris indicated the date of that discussion was March 22.

Mr. Hunt. There have been several discussions.

Senator Levin. When you found that delegation of authority too broad——

Mr. Hunt. That is what I was going to refer to.

Senator Levin. What date was that?

Mr. Hunt. I was saying earlier I couldn't recall when I got the materials from the general counsel. I wasn't sure, the 19th or the 20th. I will go on his word that he met with Dr. Devine on the 20th and at the conclusion of that meeting Dr. Devine said, oh, take these down to Hunt. Assuming that's the day, that was also the day that I raised the concern that was discussed earlier and that is March 20.

Senator Levin. On that day you had some discussions with Mr. Morris?

Mr. Hunt. Mr. Morris was in the room, yes.

Senator Levin. And Mr. Devine was there, too?

Mr. Hunt. Yes, sir.

Senator LEVIN. Was the title discussed at that meeting?

Mr. HUNT. At the time Executive Director was the title they were planning to use.

Senator LEVIN. Was there any question as to whether that was an appropriate title?

Mr. HUNT. I don't know at that session whether that was discussed. The focus of that was the concern over the original wording of the delegation itself.

Senator LEVIN. Did it become an issue of discussion at all?

Mr. HUNT. As I said, I don't know for sure. I believe it was discussed. I mentioned at one time it seemed people could misconstrue that as a throwback to the Civil Service Commission, given the nature of the position at the time, and it would seem to me that that being misconstrued could cause problems in terms of appearance.

Senator LEVIN. Was that within a couple of days of March 20?

Mr. HUNT. That was I think around the 22d at that stage. It was at that point I was led to believe other titles were in fact being considered.

Senator LEVIN. Did you have that discussion with Mr. Morris present?

Mr. HUNT. I am sorry, I can't remember if Mr. Morris was present or not.

Senator LEVIN. Was Mr. Devine present?

Mr. HUNT. Yes.

Senator LEVIN. You indicated some problems, whatever the reason, with that title of Executive Director at that time with Mr. Devine?

Mr. HUNT. Yes.

Senator LEVIN. Mr. Morris, were you present to any discussion relative to the title?

Mr. MORRIS. I do not recall any.

Senator STEVENS. Senator, we are going to have to wind it up, is that all right?

Senator Cochran?

Senator COCHRAN. Thank you, Mr. Chairman. I have just a few questions of Mr. Morris.

As general counsel, as I understand it, during the transition of the expiration of Dr. Devine's term as Director to his assumption of the position of Executive Assistant, you were his principal legal adviser throughout these events, is that correct?

Mr. MORRIS. Yes, Senator.

Senator COCHRAN. And it was on your advice that these documents were drafted to consummate this relationship, is that correct?

Mr. MORRIS. Yes, Senator, that's right.

Senator COCHRAN. There has been some discussion by several witnesses of the Position Description, which I inaccurately referred to earlier in the day as the job description. This has been put into evidence, made a part of the record, and is described as item No. 1. Do you have that in front of you?

Mr. MORRIS. Yes, Senator, I do.

Senator **Cochran**. Could you please read for the benefit of the hearing the Position Description for Executive Assistant to the Director that was drafted and that was approved by the agency?

Mr. **Morris**. Quote.

> The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's work force.
>
> Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.
>
> Is responsible for carrying out the following duties:
>
> One, directs the planning and development of an effective Government-wide personnel program for the purpose of providing the Federal Government with an effective and efficient career work force.
>
> Two, directs OPM's activities in operating an effective Government-wide personnel program and in carrying out the other operating functions for which OPM is responsible.
>
> Three, directs the administrative management of the activities and functions of OPM.

Senator **Cochran**. At the meeting of the staff, senior level staff which you described earlier, you said that Dr. Devine disclosed the relationship that he would have with the agency. Was his description of his relationship with the agency and with Dr. Cornelius consistent with the description as contained in this document which you have just read?

Mr. **Morris**. Exactly.

Senator **Cochran**. Let me ask you this: Was this Position Description attached to standard form 52 which was signed by Dr. Devine and made a part of it?

Mr. **Morris**. Senator, it was attached to the standard form 52 that was signed by Ms. Cornelius and made a part of it.

Senator **Cochran**. I am sorry, Ms. Cornelius, that's correct. And she signed that document actually hiring Dr. Devine as Executive Assistant, is that correct?

Mr. **Morris**. She signed the SF-52 and this Position Description was attached to that, yes, sir.

Senator **Cochran**. So this description of the duties of the office was well known by, or at least seen by, Dr. Cornelius and was made a part of the records of the agency, is that correct?

Mr. **Morris**. Yes, sir, that is correct.

Senator **Cochran**. So there was no intention to keep that secret in any way, was there?

Mr. **Morris**. None.

Senator **Cochran**. Was it the intention to keep any memorandum that purported to describe this description of the job secret in any way?

Mr. **Morris**. Absolutely not, and as I say, when I had occasion to talk about the other memoranda, I talked about them. I kept no secrets.

Senator **Cochran**. Those are the only questions I have, Mr. Chairman. Thank you.

Senator **Stevens**. Anyone else have any questions for Dr. Cornelius, Mr. Hunt, or Mr. Morris?

Senator **Levin**. Just one question, Mr. Chairman.

Senator **Stevens**. One last question.

Senator **Levin**. Mr. Morris, after you informed Dr. Cornelius about this delegation, did you then have any conversations with

Dr. Devine about it? Did you tell him Cornelius now knew about it or anything like that?

Mr. MORRIS. Yes, I want to see Mr. Devine sometime on the afternoon of April 29, after I had been summoned to Ms. Cornelius' office and I informed him of the conversation.

Senator LEVIN. With Ms. Cornelius?

Mr. MORRIS. With Ms. Cornelius, yes.

Senator LEVIN. You did that on your own initiative?

Mr. MORRIS. I did.

Senator LEVIN. Thank you.

Senator STEVENS. Thank you very much. We appreciate your appearance here today.

Our next witnesses will be Harry Van Cleve, the general counsel of the General Accounting Office, accompanied by Henry Wray, the associate general counsel and Michael Volpe, attorney, Office of the General Counsel.

For the information of all concerned, we will have the testimony of Dr. Devine commencing at 9:30 a.m. tomorrow morning. We intend to finish with GAO tonight.

We will take a 5-minute recess now for all those involved.

[A brief recess was taken.]

Senator STEVENS. I know you are employees, but the rules require that at nomination hearings you be sworn. Gentlemen, do you solemnly swear the testimony you are about to give to be the truth, the whole truth and nothing but the truth, so help you God?

Mr. VAN CLEVE. I do.

Mr. WRAY. I do.

Mr. VOLPE. I do.

Senator STEVENS. Thank you very much. Please proceed, Mr. Van Cleve.

TESTIMONY OF HARRY R. VAN CLEVE, GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY HENRY WRAY, ASSOCIATE GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, AND MICHAEL VOLPE, SENIOR ATTORNEY, OFFICE OF GENERAL COUNSEL

Mr. VAN CLEVE. Mr. Chairman, members of the committee, I am pleased to be here today to discuss certain issues involving the nomination of the Honorable Donald J. Devine to serve a second 4-year term as Director of the Office of Personnel Management.

A few days ago, Mr. Chairman, we received letters from Senator Roth and you writing on behalf of the Subcommittee on Civil Service, Post Office, and General Services, requesting our opinion on certain issues concerning the delegation by Dr. Devine of the Director's authority to the position of Executive Assistant to the Director.

In our opinion letters to you and to Senator Roth, which we forwarded to you yesterday, we concluded that the delegation of authority was not legally appropriate for two reasons.[1]

First, we found that delegating all of the authority of the Director to this position exceeded the intent and purposes of section

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[1] See p. 425.

1103(a) of title 5 of the United States Code. Section 1103(a) sets forth the functions vested in the Director of OPM and provides for their delegation to subordinates, but we know of no precedent for an agency head to delegate all of his powers to a subordinate.

Our second basis for believing that the delegation of authority was invalid is that it circumvented the provisions of 5 U.S.C. §1102 which limits the Director of OPM to a term of 4 years and places the Director's authority in the Deputy Director during a vacancy. In our opinion, section 1102 requires that an incumbent OPM Director must cease exercising the functions of the Director once his term expires.

Mr. Chairman, Senator Roth's letter posed four other questions which I shall discuss briefly. He asked whether it was legally proper to create the position of Executive Assistant to the Director of OPM under a limited emergency appointment in the Senior Executive Service. We concluded that OPM's actions in creating this position were procedurally correct. However, we do not believe it was appropriate to appoint Dr. Devine to the position of Executive Assistant to the Director in view of the delegation of authority which was made to that position, as I mentioned earlier.

The next question Senator Roth posed involved the validity of the actions taken by Dr. Devine while he occupied the position of Executive Assistant. We concluded that any of Dr. Devine's actions could be validated on the theory of what is called the de facto rule. Under this rule, actions by an individual who is filling a governmental office under color of authority may be given legal effect even if the individual's appointment is defective. In the alternative, we believe any actions Dr. Devine took during his tenure as Executive Assistant could be ratified at the discretion of the Acting Director of OPM.

The next issue concerned the legal requirement that delegations of authority be made available to the public when they occur. We concluded, and it appears that OPM has conceded, that delegations of authority are official agency records which must be made promptly available to the public under the Freedom of Information Act.

Finally, Mr. Chairman, Senator Roth's letter asked whether the provisions of the Hatch Act applied to the position of Executive Assistant to the Director of OPM. As we pointed out in our written response, our office has no jurisdiction with respect to investigations or enforcement of the Hatch Act. That authority rests with the Office of Special Counsel of the Merit Systems Protection Board. However, in our opinion, the position of Executive Assistant to the Director of OPM is subject to the provisions of the Hatch Act which limit the political activities of most Federal employees.

Mr. Chairman, this concludes my prepared remarks. I will be happy to respond to any questions which you and the committee have at this time.

[The letters referred to in the statement follow:]

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-218996

June 4, 1985

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This responds to your letter of May 31, 1985, requesting our opinion on the legality of the delegation of the authority by the Director of the Office of Personnel Management to the position of Executive Assistant to the Director, and on other related issues.

Our opinion on the legality of the delegation also was requested by letter dated May 23, 1985, from Chairman Stevens, of the Subcommittee on Civil Service, Post Office, and General Services. Enclosed is a copy of our letter of today to Chairman Stevens, which concludes that the delegation was not legally appropriate. Specifically, we believe that the delegation: (1) exceeded the scope of the Director's authority to delegate his functions under 5 U.S.C. § 1103(a); and (2) circumvented the 4-year limit on the Director's term imposed by 5 U.S.C. § 1102(a).

Your letter raises four other questions which we have analyzed and answered as follows: (1) the creation of the position of "Executive Assistant to the Director" under an SES limited emergency appointment was legally proper; (2) the actions taken by Dr. Devine could be validated on the basis of the *de facto* rule or by ratification by the Acting Director; (3) the Freedom of Information Act requires that the delegation of authority be promptly made available to the public; and (4) the Hatch Act would apply to the position of Executive Assistant to the Director of OPM. Your questions and our analysis are as follows.

Question: What is the legality and propriety of the creation of a SES limited emergency appointment for Dr. Devine?

Answer: Based on the information available to us, there appears to be no legal objection *per se* to OPM's actions in creating the position of "Executive Assistant to the Director" of OPM and filling this position by a "limited emergency appointment." The legal aspects of these actions are discussed below. For the reasons stated in our opinion to Chairman Stevens, however, we do not believe it was appropriate to appoint Dr. Devine to the Executive Assistant position in view of the delegation of authority and line functions vested in that position.

Positions in the Senior Executive Service (SES) are established pursuant to Subchapter II of Chapter 31, title 5, United States Code. A "limited emergency appointee" in the SES is defined as an individual appointed under a nonrenewable appointment, not to exceed 18 months, to an SES position established to meet a bona fide, unanticipated, urgent need. 5 U.S.C. § 3132(a)(6) (1982). The total number of limited emergency appointees (combined with limited term appointees who serve a nonrenewable term of 3 years or less) in all agencies may not exceed 5 percent of the total number of SES positions in all agencies. 5 U.S.C. § 3134(e) (1982). In addition, each limited emergency appointee shall meet the qualifications of the position to which appointed, as determined in writing by the appointing authority. 5 U.S.C. § 3394(a). Finally, an individual may not be appointed as a limited emergency appointee without the prior approval of the Office of Personnel Management. 5 U.S.C. § 3394(b).

In our opinion there exists clear statutory authority for creating the position of Executive Assistant to the Director of OPM. The necessary personnel forms which were provided to us as an attachment to a memorandum by OPM's General Counsel dated May 17, 1985, appear to be in order.

Our Office cannot, on the basis of the information supplied to us, determine whether creation of this position met a "bona fide, unanticipated, urgent need" as required by the statute. We have not examined, nor do we have knowledge of, the needs of the Office of Personnel Management for a senior management official to perform the duties of this position. Thus, we are unable to challenge the "bona fide" nature of this appointment. Similarly, we are not in a position to question whether the need for this position was unanticipated or urgent.

There is no indication that creation of this position exceeded the statutory limitation of these and similar positions, and, in fact, there is evidence that this position was within the proper allocation of such SES positions. See the memorandum dated March 25, 1985, from Mary Rose, OPM's Assistant Director for Executive Administration.

The statutes also require that each appointee to such an SES position must meet the qualifications of that position, as determined in writing by the appointing authority. Although there is no evidence in the documents before us that such a written determination was prepared in this instance, we believe that Dr. Devine, having completed a 4-year term as Director of OPM, clearly was qualified to perform the duties of the position of Executive Assistant to the Director. As noted previously, our conclusion that his appointment to this position was unauthorized is based on different grounds.

Question: What is the vulnerability to legal challenge of actions taken by Dr. Devine while serving as Executive Assistant to the Director?

Answer: We do not know what actions Dr. Devine took in reliance on the delegation; nor can we express a definitive opinion on the legal status of any such actions. Nevertheless, we believe that Dr. Devine may be granted de facto status so as to validate his actions, or, in the alternative, the actions he took under the delegation would be subject to ratification in the discretion of the Acting Director.

The well-recognized general rule is that governmental officials who lack actual authority may be granted de facto status so as to validate their actions. In our decision in 56 Comp. Gen. 761 (1977) we held that a de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office of position. We stated that where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs its duties, his actions are those of a de facto officer or employee. 56 Comp. Gen. 761, 765-766. It is also noteworthy that the Supreme Court applied the de facto rule to validate actions taken by the original Federal Elections Commission notwithstanding the Court's holding that the appointments of the commissioners were unconstitutional. See Buckley v. Valeo, 424 U.S. 1, 142 (1976).

Finally, even if Dr. Devine cannot be accorded de facto status, actions he took under the delegation would be subject to ratification at the discretion of the Acting Director. See e.g., 56 Comp. Gen. 761, 766; B-209946, January 12, 1983; B-150136, May 16, 1978, and authorities cited.

Question: What are the legal requirements that delegations of authority be available to the public when they occur?

Answer: The Office of Personnel Management concedes that delegations of authority are official agency records which are public in nature and must be available upon request. See memorandum of Joseph A. Morris, General Counsel of OPM, dated May 3, 1985. Our review of the applicable statutes indicates that such records shall be made promptly available to the public.

The Freedom of Information Act requires that agencies make available to any person all agency records, under the following three categories: (1) those records which must be currently published in the Federal Register; (2) those which must be promptly published or made publically available and indexed; and (3) all other records which must be promptly furnished on request.[1] The courts have held that delegations of authority need not be published in the Federal Register,[2] but we believe, and OPM apparently agrees, that delegations of authority must be made available for public inspection and copying. See 5 U.S.C. § 552(a)(2) (1982).

It would appear from the record before us that both the delegation of authority and the amendment to the OPM line of succession were approved on March 25, 1985, but were not available for public inspection until May 3, 1985, when the OPM General Counsel transmitted those documents to the OGC Index/Digest Office at OPM (memorandum of General Counsel dated May 3, 1985). We do not know whether any person or party requested copies of the documents from OPM prior to this date or whether such production of documents was refused.

Question: What provisions of the Hatch Act cover the position of Executive Assistant to the Director, once such a position is created?

Answer: Our Office has no jurisdiction with regard to Hatch Act questions since investigations and enforcement of the Hatch Act are within the jurisdiction of the Office of Special Counsel to the Merit Systems Protection Board. 5 U.S.C. § 1206(e) (1982). Therefore, our views on this subject are only advisory. However, in our opinion the Hatch Act applies to the position of Executive Assistant to the Director.

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[1] See 5 U.S.C § 552 (1982); Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 351-352 (1979).

[2] Hogg v. United States, 428 F.2d 274 (6th Cir. 1970); cert. den. 401 U.S. 910 (1971); and United States v. Fitch Oil Co., 676 F.2d 673 (Temp. Emer. Ct. App. 1982).

The Hatch Act limits the political activities of federal employees by providing that a federal employee may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or (2) take an active part in political management or in political campaigns. 5 U.S.C § 7324(a) (1982). The list of permissible and prohibited activities is set forth in 5 C.F.R. Part 733.[3]

The Hatch Act provides the following exclusions from coverage under the Act:

-- an employee paid from appropriations for the Office of the President;

-- the head or assistant head of an Executive department or military department;

-- an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in foreign relations or in the nationwide administration of federal laws; and

-- certain employees of the District of Columbia government. 5 U.S.C. § 7324(d).

In addition, federal employees residing in designated areas such as locations in the Washington metropolitan area may participate in local campaigns and elections as independent candidates or on behalf of or in opposition to independent candidates. 5 U.S.C. § 7327 and 5 C.F.R. § 733.124.

The position of Executive Assistant to the Director of OPM is within the Senior Executive Service and appears to be subject to the Hatch Act. The position is not that of the head or assistant head of an Executive department or military department. See 5 U.S.C. §§ 101, 102, listing the Executive and military departments. Furthermore, this position does not require appointment by the President or confirmation by the Senate. Finally, there is no specific exclusion for SES positions from coverage under the Hatch Act.

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[3] See also Political Activity and The Federal Employee, Office of Special Counsel, U. S. Merit Systems Protection Board.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-218996

June 4, 1985

The Honorable Ted Stevens, Chairman
Subcommittee on Civil Service, Post Office
and General Services
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This responds to your letter of May 23, 1985, which requests our opinion on the legality of a delegation of authority by Dr. Donald J. Devine. On the last day of his term as Director of the Office of Personnel Management (OPM), Dr. Devine signed a delegation of all of the Director's functions to a position described as the Executive Assistant to the Director which he filled on the next day.

For the reasons stated hereafter, we conclude that the delegation was not legally appropriate.

I.

The Director of OPM has a statutory 4-year term of office. 5 U.S.C. § 1102(a) (1982). There is no provision for the Director to hold over in office following the expiration of his term. Instead, the statute specifically provides that the Deputy Director of OPM "shall act as Director" when the office of Director is vacant. 5 U.S.C. § 1102(b).

Dr. Devine's 4-year term of office expired at midnight on March 25, 1985. On this same day, March 25, the position of "Executive Assistant to the Director" was established in OPM. The position description for this position stated in part:

> "The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.
>
> "Under the direction of the Deputy Director, [the Executive Assistant] is responsible for the general direction and planning activities of OPM."

Also on March 25 Dr. Devine approved an action whereby the Executive Assistant to the Director position became third in the OPM line of succession after the Director and Deputy Director.

Again on March 25, Dr. Devine approved the following delegation of authority to the Executive Assistant position:

> "The delegations of authority set forth in the Administrative Manual (AM) and the AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified--unless specifically revoked by the Director--when the position of Executive Assistant to the Director is encumbered as follows:
>
> "All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion."

On the next day, March 26, Mrs. Loretta Cornelius, the OPM Deputy Director, appointed Dr. Devine to the position of Executive Assistant to the Director as a "limited emergency" appointment. Dr. Devine served in the position of Executive Assistant until his resignation from OPM effective May 3, 1985.

II.

The legality of the delegation of authority and the related actions taken on March 25 and March 26 turn on the answers to three basic issues: (1) whether the delegation itself was within the scope of the Director's authority; (2) whether the delegation circumvented the statutory limit on the Director's term of office; and (3) whether the delegation conflicted with the statutory provision for the Deputy Director to act as Director during a vacancy in the office of Director. We will address these three legal issues separately for clarity of presentation.

We have reviewed two legal opinions which fully support the legality of the delegation and other actions--a letter opinion dated May 14, 1985, by the law firm of Covington and Burling and a memorandum opinion dated May 17, 1985, by the OPM General Counsel, Mr. Joseph A. Morris. We will discuss each of the major legal arguments advanced in these opinions under the issues to which they apply.

Authority for the Delegation

As a general proposition, governmental officials have broad authority to delegate their powers to subordinates. See, e.g., 1 Sutherland Statutory Construction § 4.14 (4th Ed. 1972), at 98-99:

> "The number of rule-making, administrative, and adjudicative functions which most administrative agencies must perform makes it impossible for a single executive officer or a board or commission to discharge these functions personally. Nevertheless, in many statutes it is customary to grant power directly to the executive head or the board or commission. If the statute expressly authorizes the redelegation to a subordinate official, the subdelegation is valid. Where the statute is silent on the question of redelegation and the delegation was to a single executive head, it is almost universally held that the legislature, understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates. * * *
>
> "The general principle which appears to govern decision in all of these situations is that if it is reasonable to believe the legislature intended a particular function to be performed by designated persons because of their special qualifications, then a subdelegation is invalid; but where no particular qualifications are necessary for the exercise of the function its exercise may be delegated to subordinate officials."

The authority to delegate is granted explicitly to the OPM Director by 5 U.S.C. § 1103(a), which enumerates the functions vested in the Director and provides that these functions "shall be performed by the Director, or subject to section 1104 of this title, by such employees of the Office as the Director designates * * *."[1]

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[1] Section 1104 provides in part that the Director may delegate functions to heads of other agencies.

Therefore, the OPM Director enjoys broad authority to delegate his functions, and both of the legal opinions supporting Dr. Devine's actions rely on the language of § 1103(a) to justify the March 25 delegation. The Covington and Burling opinion asserts that § 1103(a) "clearly authorizes the kind of delegation at issue here." The General Counsel opinion goes even further. It maintains that 5 U.S.C. § 1104(a)(2) allows the OPM Director to delegate to heads of other agencies any of his functions except authority over competitive examinations for administrative law judges, and concludes from this:

> "If, subject only to the express reservation in the statute, the Director may delegate his functions in whole to the head of an entirely different agency, then, a fortiori, he may delegate them to his own subordinates [under § 1103(a)]."

While Dr. Devine's delegation of all of his functions to the Executive Assistant may not violate the literal terms of § 1103(a), we do not believe that it constitutes a valid exercise of the authority granted by that provision. Rather, in our opinion, this delegation differs both in kind and in degree from the type of action contemplated by § 1103(a) or any similar delegation provision. Regardless of what the literal terms of a delegation statute provide, we are aware of no legal precedent, legislative history or logic to support the assertion that an agency head can delegate all of his functions to a subordinate.2/

2/ We note that the argument in the General Counsel's opinion based on 5 U.S.C. § 1104 only serves to illustrate the fallacy of a literal interpretation of delegation provisions. The functions vested in the OPM Director under § 1103(a) include "appointing individuals to be employed by the Office [OPM]" and "directing and supervising employees of the Office, distributing business among employees and organizational units of the Office, and directing the internal management of the Office * * *." The General Counsel cannot seriously argue that, although literally within the scope of § 1104, the OPM Director could delegate functions such as these to the head of another agency.

This assertion is, in our view, particularly unjustified in a situation such as the present case where the blanket delegation is made to a position which is not even subject to Presidential appointment and Senate confirmation, as are the positions of Director and Deputy Director. That is, when the law requires that the nomination of a person to be Director of OPM receive the advice and consent of the United States Senate prior to appointment by the President, the law must be understood as requiring the informed consent of the Senate that the nominated person will act as Director. If a person for whom senatorial consent is thus obtained could, once appointed to office, delegate his entire responsibility and functions to a subordinate official of the agency, for whom no senatorial confirmation is required, then the act of the Senate in advising and consenting to the appointment of that Presidential nomination would become in effect a nullity.

For the reasons stated above, we believe that a delegation of the scope here involved would be unauthorized under § 1103(a) even if it had nothing to do with expiration of the OPM Director's term. But, of course, this delegation was indeed related to expiration of the Director's term--which raises a second problem. Delegations normally are authorized and effected to remove the burden on an agency head of personally executing the function or functions in question. 1 Sutherland Statutory Construction § 4.14, above. Obviously this was not Dr. Devine's purpose in approving the delegation here on the last day of his term. Instead, the only evident purpose was to create a new position (which was, in fact, established on the same day) having the full powers of the Director in contemplation of Dr. Devine's leaving office. Again, this goes beyond any recognized use of which we are aware for a delegation authority.

In conclusion, it is our opinion that Dr. Devine's March 25 delegation went beyond the scope of his authority under 5 U.S.C. § 1103(a).[3]

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[3] In addition to their arguments in support of the delegation as described above, both opinions state that since the delegation was expressly made effective to the extent "not inconsistent with law," it cannot be illegal. This merely begs the question; to the extent that the delegation was indeed "inconsistent with law" and Dr. Devine took actions under it, such actions clearly would be affected.

Limitation on the Director's Term

The next issue is whether the March 25 delegation illegally circumvented the 4-year statutory limit on the term of the OPM Director. In our opinion, it did.

By virtue of the delegation of all of the OPM Director's functions to the Executive Assistant position on March 25, Dr. Devine continued to be vested with the full range of the Director's functions when he assumed this position on March 26, upon expiration of his term. In other words, under the delegation he continued to possess the functions immediately after his term ended that he possessed as Director. This is the specific and inevitable effect of the delegation on its face. As discussed hereafter, it is difficult to know precisely on what basis from March 26 onward Dr. Devine held the Director's functions--on a shared basis with Mrs. Cornelius, as a substitute for her unless and until she chose to assume authority, or under yet a different understanding. Nevertheless, the conclusion seems to us inescapable that, pursuant to the delegation, Dr. Devine did retain the OPM Director's functions in some capacity after expiration of his term.

In our opinion, Dr. Devine's continued possession of the Director's functions after March 25 cannot be reconciled with 5 U.S.C. § 1102(a) and must be regarded as an illegal circumvention of the 4-year term limitation in that provision. The situation here is similar to that in our decision 56 Comp. Gen. 761 (1977). This case concerned the validity of J. Robert Hunter's service as Deputy Insurance Administrator in the Department of Housing and Urban Development. Mr. Hunter previously had served as Acting Insurance Administrator but his right to hold that position ended with expiration of the 30-day limit for temporary appointments under the so-called "Vacancies Act," 5 U.S.C. §§ 3345-3349. In holding that Mr. Hunter could not continue to perform thereafter under a delegation of the Insurance Administrator's functions to him as "Deputy Administrator," we observed:

> "In informal discussions with HUD, prior to its decision to create the position of Deputy Administrator, it was argued that the Secretary has broad authority to delegate any or all of her functions to subordinate employees (42 U.S.C.

> 3535(d)), and therefore it was permissible for her to delegate all the functions relating to the insurance programs of HUD to Mr. Hunter in some capacity other than as Acting Administrator. We concede that a literal reading of the statute would permit the Secretary to refuse to give even a properly appointed Administrator any of the duties that would normally seem appropriate to his office. However, in this case, she has already delegated the duties to an Administrator, and made them part of his job description. Once the period in which he may legally perform those duties has expired, any redelegation to another position--particularly if the other position is occupied by the same man who can no longer serve as Administrator--would seem a patent circumvention of the Vacancies Act." 56 Comp. Gen. at 764. (Emphasis supplied.)

We are not persuaded by the arguments in the two opinions that the delegation does not circumvent the limit on the Director's term. The Covington and Burling opinion states that the only congressional purpose in enacting the 4-year term was to grant the Director a measure of independence from the President. This opinion further observes that there is no limit on the number of terms a Director may serve and that Congress clearly contemplated that there might be an "interregnum" between one individual's terms. Further:

> "Congress made no affirmative provision for handling any such interregnum, nor did it prohibit any particular arrangements. Accordingly, any arrangements not otherwise inconsistent with law are permissible."

As to the first argument, Congress' rationale in enacting the statutory limit on the OPM Director's term is immaterial. The point is that a statutory limit was imposed which clearly prevents the Director from continuing in office once his term expires.[4]

Next, we agree that there is no limit on the number of terms that an OPM Director may serve and that Congress may well have envisioned an interregnum. However, Congress did provide a specific arrangement which governs a "vacancy" in the office of Director--under § 1102(b), the Deputy Director becomes Acting Director. Therefore, we do not understand the basis for the suggestion in the Covington and Burling opinion that the law made no affirmative provision for an interregnum. We think it does so in the same manner as it covers any other vacancy in the office of Director. This suggestion likewise finds no support in the General Counsel's opinion, which clearly recognizes that Mrs. Cornelius became Acting Director as a matter of law upon expiration of Dr. Devine's term.

Finally, there were no doubt practical reasons for desiring Dr. Devine's continued presence and involvement at OPM during the "interregnum." However, this could certainly have been accomplished in many ways that would raise no question of circumventing § 1102. We fail to see why it should have been necessary to grant Dr. Devine the Director's functions in order to obtain his continued presence at OPM.

Effect on the Deputy Director's Authority

Whether the delegation of authority violated Mrs. Cornelius' statutory role as Acting Director of OPM from March 25 to May 3 presents the most difficult issue. We have no direct information as to the relationship between Dr. Devine and Mrs. Cornelius during this period. Moreover, the discussions on this point in the two opinions consist primarily of general characterizations which seem to us ambiguous and at times somewhat contradictory.

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[4] We note that the OPM General Counsel's opinion concedes the effect of the term limitation:

> "OPM's organic statutes do not provide for the holding-over of a Director whose term of office has expired. Because the same statutes do provide for the holding-over of certain other officers, * * * it must be presumed that Congress did not intend for a Director of OPM to continue in office after the end of his four-year term. * * *"

The Covington and Burling opinion states that during this period Dr. Devine testified at several congressional hearings, other than his confirmation hearing, and that Mrs. Cornelius had Dr. Devine chair the meetings of OPM's Senior Staff, Senior Policy and Noncareer Policy meetings. On the other hand, the General Counsel opinion describes the relationship as one in which Mrs. Cornelius and Dr. Devine shared the power of the Director, but with Dr. Devine having a subordinate role. It adds that this relationship:

> "* * * represents a reasonable adaptation of the traditional relationship between the Director and the Deputy Director to the exigencies of a circumstance in which the office of Director was vacant; with the Deputy Director acting, by operation of law, as the Director, the Executive Assistant to the Director was needed to act, by operation of sound discretion, as the Deputy Director. The Delegation of Authority that is at issue here achieved precisely that result."

At another point the General Counsel opinion asserts that:

> "* * * considerable evidence exists that his [Dr. Devine's] appointment to a subordinate position within OPM was intended less to perpetuate his direct leadership of the agency and more to facilitate the processes of his interaction with Congress in his capacity as Director-Designate, not altogether unlike arrangements made in times of transition of Presidential Administrations. * * *"

The General Counsel frames the issue of whether the delegation was inconsistent with Mrs. Cornelius' status as Acting Director as follows:

> "* * * The test of the arrangement here in question, then, will be the right of the Deputy Director, in her capacity as Acting Director, to control the conduct of the Executive Assistant to the Director. If that right is unambiguous and

> assertable, then it cannot be said that the functions delegated to the Executive Assistant to the Director improperly encroach upon the Deputy Director's authority."

We agree with this statement of the issue, but have less confidence in the conclusion that Mrs. Cornelius' right of control was "unambiguous and assertable." In our view, the relevant documents are not entirely clear on this point. It is true that the position description for the Executive Assistant and the revised line of succession made the Executive Assistant subordinate to Mrs. Cornelius as Acting Director. Also, the delegation of authority was expressly made subject to revocation by "the Director"--a power that clearly would devolve to Mrs. Cornelius as Acting Director.

On the other hand, the position description for the Executive Assistant did not refer to the delegation of authority and did not reflect the full range of the Executive Assistant's functions under the delegation. Moreover, it is not clear to us whether Mrs. Cornelius knew of the delegation during the March 26 - May 3 period. We also do not understand why it was not left to Mrs. Cornelius to fashion a delegation to Dr. Devine after she became Acting Director if only a subordinate role was intended for him.

In view of these uncertainties and our lack of more specific information, we cannot express an opinion at this time on whether the delegation undercut Mrs. Cornelius' role as Acting Director in violation of 5 U.S.C. § 1102(b).

Charles A. Bowsher
Comptroller General
of the United States

Senator STEVENS. Do either Mr. Volpe or Mr. Wray have anything to add to that statement?

Mr. WRAY. No, sir.

Mr. VOLPE. No, sir.

Senator STEVENS. You based your opinion on the two letters we sent and the law. You did not have the facts in front of you. Were you here while Dr. Cornelius testified today?

Mr. VAN CLEVE. Yes, I heard all her testimony.

Senator STEVENS. You heard her testify that she had no knowledge of the delegation of authority. Would that change your legal view of this situation in any way?

Mr. VAN CLEVE. It would not change our view either that a delegation cannot be proper that delegates the entire authority of the Director to another official. We think that goes beyond the proper limits of any delegation of authority. Furthermore, we do not think that a delegation of authority can be used to circumvent the 4-year limit of the term of Director of OPM. There is an ambiguity, as I see it, in some of those documents because the delegation recites that it is subject to the Executive Director—I am sorry, to the Acting Director's authority. Since she was unaware of that document and, thus, unaware of any limitation in it which would have given her the right to do anything of that sort, I think it may make some difference that the document was not known to her until April 30.

Senator STEVENS. With regard to the actions taken by Dr. Devine, there is no question your opinion points out they could be ratified by the Acting Director?

Mr. VAN CLEVE. The actions taken as Executive Assistant, yes, sir.

Senator STEVENS. Pardon me. Did the delegation of authority impinge upon Dr. Cornelius' authority to take any legal action?

Mr. VAN CLEVE. Dr. Cornelius' authority essentially stems from the organic act that establishes the Office of Personnel Management. I would think there would be no doubt of the legality of those actions.

Senator STEVENS. Very well. The sum and substance of your testimony is that the delegation of authority was neither correct nor lawful?

Mr. VAN CLEVE. Yes, sir.

Senator STEVENS. Senator Cochran?

Senator COCHRAN. Mr. Chairman, I don't have any questions of this witness except to inquire as to whether or not he has had an opportunity to review opinions that have been provided to the committee by the general counsel of the Office of Personnel Management, Mr. Joseph A. Morris, or the law firm of Covington & Burling, which also submitted an opinion to Dr. Devine.

Have you had an opportunity to review either of those opinions?

Mr. VAN CLEVE. Senator Cochran, we have reviewed the entire document written by Mr. Morris on behalf of OPM. We have also reviewed a document dated May 14 on letterhead of Covington & Burling.

Subsequently, they have referred to a memorandum of May 16, 2 days later. In light of that later discussion of a document on May 16, we are not sure we looked at the right one. I spoke with the gentleman who signed the May 16 letter at noon today and he is going to send me a copy of the May 16 letter. He does not think there was substantial difference between the document we looked at dated May 14, but he was not able to say.

Senator COCHRAN. Mr. Chairman, the committee has a letter dated May 14, 1985, on the letterhead of Covington & Burling.[1] I think to make the record of the hearing complete, we ought to include a copy for the record of this hearing and also include a copy of the May 17, 1985, memorandum which was prepared by Joseph A. Morris.[2] Both of those documents ought to be made a part of the record.

Senator STEVENS. They will be, along with the opinion of the GAO.[3]

Senator COCHRAN. I have no other questions, Mr. Chairman.

Mr. VAN CLEVE. May I note, Mr. Chairman, we have discussed and dealt with the arguments in both Mr. Morris' memorandum and the May 14 draft of the Covington & Burling memorandum in our letters of yesterday.

Senator STEVENS. I have read them all. I thank you.

We also thank you for the prompt way you responded to the chairman and to me.

Senator Eagleton?

Senator EAGLETON. Mr. Chairman, I ask unanimous consent that at the point we are putting in the various opinions, we also include the legal opinion of the Congressional Research Service, Library of Congress, in which they come down with the same conclusions as does Mr. Van Cleve, to wit, it was an unlawful delegation, and I ask it be printed in the record along with those other opinions.[4]

Senator STEVENS. Without objection, this would be a good time to ask the staff to get ready by tomorrow's hearing a set of the documents—they are in the record properly numbered—so that when we talk to Dr. Devine tomorrow, we will all be referring to the same documents.

Senator EAGLETON. I have a couple of questions of Mr. Van Cleve.

Senator STEVENS. Yes, sir.

Senator EAGLETON. In your prepared statement, page 3, Mr. Van Cleve, you say, "We concluded, and it appears that OPM concedes, that delegations of authority are official agency records which must be made promptly available to the public under the Freedom of Information Act." It is very clear under the law, these documents must be made public under the Freedom of Information Act. Were you present during the testimony of Mr. Joseph Morris, Counsel?

Mr. VAN CLEVE. Yes, sir, I was.

Senator EAGLETON. He doesn't think much of the Freedom of Information Act. Where do you get this idea that OPM concedes anything about this, in terms of what Mr. Morris testified to? He is their legal big wig.

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[1] See p. 525, item 17.
[2] See p. 514, item 16.
[3] See pp. 425 and 431.
[4] See p. 536, item 18.

Mr. VAN CLEVE. My reference in my testimony was not in reference to Mr. Morris' testimony before this committee today. It was to the OPM legal memorandum which he signed and which had been made available to us, and which Senator Cochran referred to. If you would like me to get the exact reference in that letter, I can do so.

Senator EAGLETON. I will read it tonight. In that legal memo, does he acknowledge these documents should have been made public.

Mr. VAN CLEVE. I beg your pardon?

Senator EAGLETON. Does he, in that legal memo, acknowledge these documents should have been made public?

Mr. VAN CLEVE. Yes, sir. I am told it is not in his opinion, but in the May 3 memo.

Senator EAGLETON. Mr. Morris——

Mr. VOLPE [interposing]. Senator, it was our construction of his transmittal of May 3 to the OGC Index Digest. It was our construction of that transmittal that he intended this was a public document.

Senator EAGLETON. Public May 3, but not public March 26. Yes, he did make them public May 3. On May 3, that's when they washed the whole thing. On May 3, they said, "Well, we have delegated, Don's delegated to Don, and we revoke it all," one huge fell swoop of public disclosure, May 3, after it was bye-bye, Don. After Ms. Cornelius had complained, after the White House had intervened and tried to save Don Devine's job, Ms. Cornelius had enough guts to say, "He has got to go," after it all hit the fan, yes. Then they made the documents public. Even today, Mr. Morris found nothing that would compel him to make these things public on March 26.

Anyway, let me ask you these questions, Mr. Van Cleve.

To summarize your opinion, am I correct in saying that you found this delegation to be illegal and a clear circumvention of the intent of Congress as expressed by its establishment of a statutory, fixed term with no holdover provision for the Office of Director?

Mr. VAN CLEVE. That is correct, sir.

Senator EAGLETON. Are there not some statutes dealing with some other jobs that provide for a holdover of the occupant when the term expires.

Mr. VAN CLEVE. A great number of statutes specifically provide for holdover until a successor is nominated and appointed to serve.

Senator EAGLETON. Some statutes don't provide it?

Mr. VAN CLEVE. That's right.

Senator EAGLETON. And this is one that doesn't?

Mr. VAN CLEVE. Yes, sir.

Senator EAGLETON. Second, am I correct in understanding that it is your position that given the scope it involved, this delegation would have been illegal even if it had not been connected with the expiration of the Director's term?

Mr. VAN CLEVE. Yes, sir.

Senator EAGLETON. Because it was so broad?

Mr. VAN CLEVE. It's a delegation lock, stock, and barrel of every bit of authority of the Director to somebody else. I think that goes well beyond any contemplation of authority to delegate.

Senator EAGLETON. Third, I would like to clarify a point in your opinion regarding the availability to the public of the records of delegations of authority. You state in your legal opinion that such records are covered under the Freedom of Information Act and as such, according to applicable statutes must promptly, must promptly, be made available to the public. You noted from the documents that you were furnished that there was a lapse of 39 days from the date of the delegation to the date a record of it was made available to the public.

Question: In your opinion, does this lapse of time satisfy the intended promptness expressed by the applicable statutes?

Mr. VAN CLEVE. No, sir, I think it does not.

Senator EAGLETON. Fourth, is Mr. Milton Socolar the Special Assistant to the Comptroller General?

Mr. VAN CLEVE. Yes, sir, he is.

Senator EAGLETON. To the extent of your knowledge, would you please compare and contrast his position at the GAO to the position that Dr. Devine held as Executive Assistant to the Director of OPM? I ask that because Dr. Devine in his prepared testimony said he is the second coming of Milton Socolar.

Mr. VAN CLEVE. The positions seem not to be comparable, Senator Eagleton. Mr. Socolar has certain limited delegations of authority from the Comptroller General. One is to act on his behalf on personnel matters that arise in the agency. A second is to sign legal opinions of the Comptroller General on his behalf. Those are published and available and well-known to the whole world.

Mr. Socolar, from time to time and in the absence from town of the Comptroller General, does exercise the Comptroller General's authority. This is for the limited period of time during which the Comptroller General is out of town.

Again, that authority is public and made available. One other point to note is that while the law does provide for a Deputy Comptroller General, none has served for almost 4 years, so that the provisions in our law which provide that the Deputy Comptroller General shall exercise the authority of the Comptroller General in circumstances, including the absence from town of the Comptroller General, can't apply since we do not have a Deputy Comptroller General.

Senator EAGLETON. Finally this, Mr. Van Cleve: If Mr. Bowsher, Comptroller General, came to you and sought your legal advice that he was contemplating to delegate all of the authority of his position to his Special Assistant, what would you advise him?

Mr. VAN CLEVE. As our opinion today suggested, that is beyond any authority he has to delegate and that such a delegation would be invalid.

Senator EAGLETON. That is all I have, Mr. Chairman. Thank you.

Senator STEVENS. Senator Cochran?

Senator COCHRAN. I have no other questions.

Senator STEVENS. We thank you, gentlemen. We are sorry to have kept you waiting all day. I hope you enjoyed the vacation. [Laughter.]

We will reconvene the hearing tomorrow morning at 9:30. The witness will be Dr. Devine.

Thank you very much.

[Whereupon, at 5:25 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., the following day.]

RENOMINATION OF DONALD J. DEVINE

THURSDAY, JUNE 6, 1985

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The committee met at 10 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Cochran, Eagleton, Levin, Glenn, and Gore.

Senator STEVENS. We are here today to continue the confirmation hearings on the nomination of Dr. Donald Devine to a second term as Director of the Office of Personnel Management.

Dr. Devine is here. Dr. Devine, since these are new hearings—the last ones have been closed—we have been advised that we should again administer the oath.

Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DEVINE. Yes, sir.

TESTIMONY OF DONALD J. DEVINE, DIRECTOR-DESIGNATE, OFFICE OF PERSONNEL MANAGEMENT

Mr. DEVINE. Thank you, Senators.

The first thing I would like to do is to thank you, for myself and my family, for giving me the opportunity to testify before this additional hearing so that I could provide further information in support of my nomination to be the Director of the Office of Personnel Management.

Many statements have been in the press and at the long series of hearings yesterday, which I know were difficult for you as well as for Ms. Cornelius and members of the OPM staff. I think it is important that I set the record straight, as I see it, and to present my view.

My children have asked me to say why they couldn't be here. My son Michael is on maneuvers in the Caribbean with the Navy. Bill and Patricia had to work today. They were here yesterday. I would like to thank my son Joe and my wife Ann, who, as you Senators know as well as anyone, are the ones that bear most of the cost for these kinds of situations.

Griffin Bell wrote a book in which he talked about the difficulties from the nominee's side of this process, and I can tell you from personal and family experience that it is difficult.

I was honored when President Ronald Reagan asked me to serve again as Director, and I have appreciated his continuing support. Reasonable men and women can differ over the policies I have pursued as Director, but I think few can deny that I have advanced the President's proposals to reform personnel management. As the head of one employee association, who normally wears a Democratic donkey tie pin, said, after otherwise disagreeing with me: "I'll give him credit, though. He's one of the most effective Directors I've ever seen, and I've been around for 40 years."

In any event, I have attempted as Director of OPM to manage the civil service as effectively and efficiently and fairly as I could. The results of my stewardship at OPM speak for themselves. Through fiscal year 1985, I have saved $6.4 billion administratively and an additional $2 billion through legislation supported by the administration and passed by Congress. Over the next 5-year budget cycle, the savings will total well over $20 billion.

At OPM we have lowered staff levels, primarily through attrition, by 22 percent and are providing better service, more quickly, and at lower unit cost. As one of your colleagues, Senator Proxmire, said, while not always agreeing with me, "There is no question that Dr. Devine has done a good job of holding down the cost of his agency operation." Senator Proxmire even said that he hoped that "we can learn from Dr. Devine what his secret is."

Our accomplishments have been recognized by taxpayers and taxpayers' groups, including the National Taxpayers' Union, the National Tax Limitation Committee and many other such groups, including the Chamber of Commerce of the United States quite recently. Other nonpartisan organizations, such as the National Council of Technical Service Industries, the United Way of the National Capital Area, and the Georgia Association of United Ways, have also supported my renomination. Editorial opinion in newspapers across the United States has urged that I be reconfirmed as Director, including the Detroit News, the Atlanta Constitution, the Wall Street Journal, the Richmond News Leader, the Dallas Morning News, and several smaller publications. I appreciate this broad-based support.

Over the past 4 years, the Director of OPM has been subjected to unusually close media and congressional review. As a result, all of my actions as Director are on the record. One op-ed newspaper column, while disagreeing with many of my actions, acknowledged that:

> Traditional standards for reviewing Presidential appointments hold that the only grounds for denying confirmation are evidence of illegal, immoral, or unethical behavior, although a good case can be made with proof of incompetence. None of these circumstances apply here.

Of course, it is the obligation of the Senate to review closely all aspects of a nominee's personal and professional life. This hearing has been held specifically to discuss the transfer of authority that took place after my term as Director expired after March 25, 1985. On that day, Deputy Director Cornelius and I discussed the creation of the position of Executive Assistant to the Director. She then signed a standard form 52, to which a Position Description was attached, thereby establishing the Executive Assistant position and setting its duties.

The Position Description outlining my duties read as follows, in part: "Under the direction of the Deputy Director, [Devine] is responsible for the general administrative management and the general direction and planning activities of OPM."

I would like to read further in the Position Description. It says that "The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's work force.

"Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.

"Is responsible for carrying out the following duties: Directs the planning and development of an effective Governmentwide personnel program." Skipping down to 2, "Directs OPM's activities in operating an effective Governmentwide personnel program and in carrying out the other operating functions for which OPM is responsible." And 3, "Directs the administrative management of the activities and functions of OPM."

Now clearly this document shows very broad powers for this Executive Assistant to the Director. It was public in every way. It was attached to several documents within the OPM system. It was available to any member of the public at any time. And it very, very clearly shows the very broad range of the duties of this Executive Assistant to the Director, which again is responsible for directing and coordinating the Office of Personnel Management's work force. Coordinating the work force gives a very, very strong role to this position. There was never any attempt to hide in any way the tremendous, large scope of this position, which says very clearly and carefully is to be under the direction of the Deputy Director and, of course, Director.

Now immediately after discussing this instrument with then Deputy Director Cornelius, and her signing it—and I remember very vividly, as she testified yesterday, that she glanced at the document. I am not in my mind knowledgeable about how much she read of it in detail. She looked at it very, very cursorily and, therefore, may not legitimately have known the scope of that, but clearly had the opportunity to know what the scope of the responsibilities that were given to me were.

Immediately after, this decision document was again discussed at a meeting with the senior policy staff. Ms. Cornelius mentioned that she remembered we talked about the mail flow. I have talked to several others of the dozen who were at that meeting and they remember discussing significantly more. I don't question at all Ms. Cornelius' judgment on remembering this. This was a long time ago and we discussed many things at that meeting. But my memory is clear, in any event, that we discussed in quite some depth precisely what the relationships would be in the new transition period, which we again thought would be a very short period of time. And we also discussed it at later meetings of the policy staff, which are the top policy people, executives, in the organization.

For 4 weeks or so OPM operated openly under this arrangement. On May 1, when the arrangement was deemed no longer tenable by Acting Director Cornelius, I agreed to resign.

To precisely assess how OPM functioned during this period, this committee requested all major decision documents acted upon at OPM between March 25 and May 3.

I would like to emphasize that this was not a collection of materials that I originated. It was requested by this committee when they asked for what the documents were and was sent by Acting Director Cornelius and was analyzed by staff at OPM.

I have presented before you and presented with the testimony a graph summarizing what the results of this study were. I would like to go over them for a moment.

As you can see, the total number of decision documents which were submitted under this request were 93. Fifty-five of those 93, a clear and strong majority, were signed by Acting Director Loretta Cornelius; most of them with my review, it is so, but a significant number done without my review at all. I think this clearly shows that the Deputy Director was in charge, as she said yesterday she was, and how the agency was in fact operated with her acting as the top legal officer within OPM.

Twenty-five other documents were dealt with in different ways, sent back to agencies by different people. The overwhelming majority of them were also done by the Deputy Director.

This is a little different here. This white section represents those that happened on March 25, since that was asked for by the committee, but obviously, since I was still Director then, those are not relevant. There are only 7 documents out of the total of 93, a very small percentage, that were signed by me—a certainly not unusual percentage for any executive to take within an executive branch organization.

Many of the 25 ultimately would have action taken by others in the organization acting under the duties of their Position Description.

Only 7 documents out of 93, again, is not an unusual number to be signed during this period of time, especially considering that 25 were acted upon by other OPM officials in some capacity, and that the Deputy Director in this set of materials signed an important contract on March 25 before she became Acting Director, operating under her broad duties as defined in the law and her Position Description.

What were the items I signed? They included the following. Two pieces of correspondence, including a letter to Mrs. Reagan, who clearly would know me better. It was that kind of judgment that I used in making these decisions.

Authorization for internal emergency hiring authority. As the title suggests, it was emergency. It had some time dimensions to it, and I got to it late in the day. Ms. Cornelius was not available and I signed that.

Third, a quarterly report on the employee awards program. Hardly significant at all.

Approval of a recommendation from the general counsel intervening in a case before the Merit Systems Protection Board—a case we had discussed many times, including at policy staff meetings, at which we had all decided not to go ahead, that it was very ministerial.

A review of a memorandum to the Executive Assistant concerning the Federal Prevailing Rate Advisory Committee. Obviously any executive deals with any other executives in the organization. The memorandums are addressed to them.

And an authorization for early out retirements at the Small Business Administration, where again this had been back and forth between SBA and OPM for a good period of time, and we finally had worked out the agreement. It was basically already decided between both organizations at that stage, and it seemed to me to be very clearly ministerial at that stage.

I don't believe any of these can be called fundamental decisions, and they clearly show that I was not running the agency during the period after March 25.

Again referring to the table of the documents, Acting Director Cornelius clearly made the major decisions. As she testified yesterday to the question asked her, was there any doubt in your mind that you were in charge, she said no. So another question was asked, is there any indication that anything was approved without your agreement, and she also responded no to that.

I think the clear indication of the study, the testimony yesterday by Acting Director Cornelius, and my testimony today show what in fact was happening at OPM.

I believe Congress was also aware of this arrangement. On March 26, the committee was hand delivered a press release announcing the establishment of the Executive Assistant position and the Acting Director's appointment of me to that position. This release was also sent to all Members of Congress.

At the previous confirmation hearing on April 2, Senator Eagleton asked me if I could submit a report, several reports actually, but in this case referring to a particular one, "as Executive Director to the Acting Director." And that appears on page 161 of the transcript.

This committee, through its Investigations Subcommittee, asked me to testify even though I advised them I was no longer Director and mentioned that at the hearing. The House of Representatives also had me testify on April 2 knowing that my term had expired.

Now let me turn to the question which has been raised regarding the legal status of the delegation. Senior OPM staff and I understood that the Senate might not complete its deliberations on my renomination before my term expired on March 25. I consulted extensively with the OPM general counsel prior to March 25 and he advised me that the actions we took were legal.

I think it is very important to stress that an executive in the executive branch of the Government makes hundreds, even thousands, of decisions and in all he must be guided by his general counsel as to their legality. I am not myself a lawyer and I must follow the opinion of my general counsel. And I acted in good faith under his advice, which he subsequently reviewed and provided a legal memorandum to this committee which I think clearly shows that it was a legal delegation. I also asked the prestigious Washington law firm of Covington & Burling to review the legal status of our actions. That also has been entered into the record. And they, too, found them legal.

Yesterday the General Accounting Office testified and presented a letter from the Comptroller General. I have only had a brief time to review it, and my counsel has briefly responded to it in this way.

First, the Comptroller General in effect concedes that the delegations "may not violate the literal terms of section 1103(a)." May not violate the literal terms of section 1103(a). Moreover, his opinion—the opinion of the Comptroller General—that the delegation was "not legally appropriate" has no supporting precedent. I will stand by the plain language of section 1103(a) which the Comptroller General has chosen to ignore. The Comptroller General is rendering a policy judgment here, aided comfortably by hindsight and not a legal conclusion.

Second, in regard to section 1102(a), the Comptroller General concludes that that section which limits the Director's term to 4 years was circumvented because of my "continued possession of the Director's functions." But that statement assumes its own conclusion. As the evidence I presented here shows, I did not continue to act as the Director. The assumption in the Comptroller General decision is that we did not act that way and in fact we did act that way, as the Deputy Director also testified yesterday.

Moreover, I strongly disagree with the Comptroller General's opinion on this issue that Congress' intent is immaterial, as they say on page 7.

Third, the Comptroller General in the third section 1102(b) expresses no opinion as to whether my actions prevented Ms. Cornelius from exercising her responsibilities under that section, 1102(b). Once again, however, the evidence I presented today demonstrates that Ms. Cornelius was fully able to serve as Acting Director and did serve as Acting Director and testified yesterday that she felt that she had full authority, in response to a question from Senator Cochran, and therefore, clearly there could be no violation of 1102(b).

I have considerable respect for the Comptroller General, but I would respectfully submit that his letter does not undermine in any way my view that we acted lawfully at all times during this interim period in which I was Executive Assistant to the Director.

As I have previously noted, the decision document creating the position of Executive Assistant contained a Position Description that spelled out its duties and responsibilities. I have read from that before. I won't take more of your time to read it again but ask you to recall the strong terms in which it gives the responsibility in that document, the major legal document, along with standard form 52, to establishing this position which was signed and, as Ms. Cornelius mentioned, was at least briefly read by her.

Moreover, Ms. Cornelius attended several senior staff policy meetings where the post-March 25 working arrangements were discussed. I believe in good faith that Ms. Cornelius and other senior OPM staff fully understood our decision and that I was to work, in the words of the Position Description, "under the direction of the Director," and the Deputy Director, Ms. Cornelius.

Moreover, please bear in mind that the delegation was viewed by us at the time as strictly a housekeeping measure. I know that may seem difficult to understand with all of the questions that have been raised about the document at this stage, but the fact of the matter is that it was viewed by us as housekeeping, as a protective measure to assure that actions taken by me during this period would not be legally questioned and subject the agency to any concern, any legal challenge.

In a letter to the Wall Street Journal, Senator Eagleton stated: "In violation of the law, Mr. Devine has signed, over the title of Director, bulletins to the Federal Personnel Manual and notices to the Federal Register."

As a matter of fact, the documents mentioned—and they were mentioned yesterday in questions by another Senator also—were all signed before March 26, according to a study done by the staff of the Office of Personnel Management. But the fact is that it was concerns being raised such as this—and especially by Members of Congress—that this document was created to assure that administrative error, incidental or accidental administrative error, would not lead to legal problems for the Office of Personnel Management.

I agreed to this document as a conservative management decision to assure that there was protection for the agency. This document was not shown to the Deputy Director, as she properly testified yesterday. I will only say that the two legal forms that actuate the decision, the SF-52 and SF-1390, with a Position Description attached, these are the legal documents that are necessary to set it up—and not incidentally, I might add, so I could be paid, which the Senator mentioned was a legitimate reason—but that these are the documents normally signed at the time by the top executive. The others are considered ministerial.

When I discussed it with Ms. Cornelius, I had a file with all of the forms in it. The two on the top were the ones that were the SF-52 with a Position Description and the form 1390. I gave them to her to sign because they were the ones that she had to sign, and she looked at them very quickly. She seemed to understand from our discussion before I gave her the form precisely what the relationship was. She commented that the title of Executive Assistant was preferable to her, which was my preference also. And she signed it and didn't evidence any interest in any other. And I just, frankly, didn't show her the other. That may have been a mistake, and certainly in terms of the way it has been portrayed, I am willing to admit that it was a mistake on my part. But I would like to assure you that it was innocent error and that it was there.

I do know as the top executive in OPM what the important legal forms are, and that was not one. I might mention that that is not in fact the delegation of authority. That is a memorandum authorizing the creation of a delegation of authority.

It was mentioned yesterday, I believe by Senator Eagleton, quoting from the Administrative Manual, why it didn't go to the Deputy as shown in the Administrative Manual. As you remember, the Administrative Manual he quoted from had a section—I think it was 12.2 or something. That is how the Administrative Manual is done. It is done by numerical sections. And therefore, this memorandum would simply be a memorandum which went to the Associate Director for Administration to institute the actual changing of the Administrative Manual, which would then be sent by him, as it says in the Administrative Manual, to the Deputy Director who would then approve it.

Now, of course, I didn't give it to the Associate Director for Administration for almost a month, and I will accept responsibility for that also I will say in mitigation of that that he was not available on March 25. He was on vacation and was, I believe, for the rest of that week. I put it in my files and forgot about it and assumed that presumably someone would ask me for it, and then it would come out again. And eventually they did.

Admittedly, it was late. No fault of his. I should have given it to him earlier. And again, it is easy to look back when you are making thousands of decisions as a second ranking executive in an organization with major duties. Perhaps I should have done many things differently, and certainly the tenor of this hearing suggests so.

My idea, however, was clear. It was to provide for the smooth running of OPM, to work with my general counsel, to assure that I had a legal document. As was testified yesterday, to the degree that I dealt with the delegation of authority agreement, my role was to narrow it and to restrict its application with my understanding that it would be in total consistence with the Position Description.

Now that was my goal. Whether we met that goal, I don't know. But it was clearly not my intention to hide anything.

I would, finally, like to deal with the statement which concerned many people yesterday about Ms. Cornelius and a statement she recalled me saying, couldn't you say you knew about the delegation. I was very interested in Ms. Cornelius' statement yesterday, her response to questions. And as you are well aware, I sat and listened through all of it, and I, like you, was impressed with her general forthcomingness.

I basically agreed with most of what she said. There are some minor things that I remembered differently, but I don't think it is worth nit-picking about minor things. I know it was very difficult for her. I think she performed very well under what I know are difficult circumstances, and especially for her, at least in regard to our past 4 years of activity.

However, the statement she quoted in the regard that I just mentioned, I simply—because she was forthcoming—I just must believe that she misunderstood what I told her, either because she didn't understand what I said or perhaps maybe I wasn't as clear and lucid as I could have been.

I couldn't come before this committee and say that I can remember precisely what the words were that I said to her on that night so long ago. But I can absolutely and without any reservation at all tell you that I did not tell her or anyone to lie. First of all, I don't think it is credible that under a condition Senator Eagleton called something like the jig being up, or whatever, that someone is going to ask someone who is now questioning an arrangement to do something as silly as this. It is not credible to me that anyone could think that that would be done.

But much more importantly, what was I trying to say? I was trying to say precisely what I said in my statement, and I have tried to repeat again today. And I will emphasize that my statement was done before I heard Ms. Cornelius yesterday. What I was trying to say to her is that how could you not know about the delegation when you knew about the Position Description? I am saying if you knew about the Position Description, couldn't you say you knew about the fact of the delegation? Because that is what the legal fact of the delegation was, in the Position Description.

Now, I wasn't talking to her in terms of giving her advice. I am a professor. I have been criticized for being a professor. I was talking about a logical point, that if you knew about the Position Description, which says that the Executive Assistant to the Director is responsible for the general administrative management and the general direction and planning activities of OPM—he directs the planning and development of an effective Governmentwide program, directs OPM activities in operating an effective Governmentwide personnel program, and carrying out other operating functions for which OPM is responsible, and directs the administrative management of the activities and functions of OPM—in my mind, and again I am not a lawyer, that said what the powers and the delegation of authority were. And all I was saying was precisely that. There was no intent in any way to tell anyone to say anything differently.

Now, if in some way I confused Ms. Cornelius on that, all I can say is I am sorry for the misunderstanding. I thought I was making a logical point to help her make up her mind as to what in fact she did know about the situation. I was not at all talking about talking to anyone else.

Now I hope that I have explained to the committee the actions I have taken both before and after March 25. The data clearly show that Acting Director Cornelius signed all significant documents during that period and that I signed a miniscule proportion, all minor documents.

My position as Executive Assistant is not at all unusual in the Government. For example, Milton Socolar, who was asked to testify before this committee, serves as Special Assistant to the Comptroller General, a very similar situation. In response to a question yesterday, the representative from the General Accounting Office was asked what the duties of the Special Assistant were and was asked whether the situations were not in some way similar. He responded that he didn't think it was similar since there was no appointment pending.

Of course, Mr. Socolar has been considered as Deputy at the General Accounting Office, was not nominated for it, and yet serves as the Special Assistant in a major role.

Now, I don't find anything wrong with that. It was mentioned that he has in his delegation of authority to act on all matters of personnel and to sign all legal opinions. That is certainly a very broad grant of authority to that individual in that organization. He has the power to act when the Comptroller General is out of town in all respects for the Comptroller General. So I don't think this is unusual. And there are several other examples of people acting in major ways as deputy—mentioned, or at least one example mentioned, here yesterday.

The establishment of the position of Executive Assistant was fully discussed with Deputy Director Cornelius in the presence of senior policy staff at a meeting March 25, 1985. Our actions were taken only for the purpose of protecting the agency and ensuring efficient management over a short period of time.

Again, as Senator Cochran asked Ms. Cornelius yesterday, were you in charge, her answer was an unambiguous yes. She was asked if she had the power to change. Her answer was an unambiguous yes.

Now the Director of the Office of Personnel Management is a very difficult position. A union leader in the Federal service has privately admitted to me that it is the most difficult job. I have done the best I could and there have been notable accomplishments. And it was my purpose to request the committee to take my statement and after questions, to favorably consider my nomination.

I believe that I have fully answered all the legal questions raised here, all the prudential questions, fully, without reservation, honestly, and I think they very credibly show how in fact I acted and why. All was under the guidance of legal counsel.

But it has become clear to me that we can't discuss my qualifications for Director of OPM. There are serious questions in the committee about the policies I pursued as Director of OPM. I believe that is the real issue. There are disagreements with my policies. Of course, everyone is entitled to disagree with those policies. I believe they have been extraordinarily successful. I believe that we have saved the taxpayers more money than any agency of any closely comparable size; that we have managed more efficiently with fewer people; that we have set the course of personnel management for reform in the retirement system—the widely acknowledged reforms in the health insurance system, and many, many other changes that we have made; that the record stands for itself and can be evaluated on its own basis.

But as Senator Eagleton said to me during our first hearing, I am a political person. And although it has been confirmed by a Democrat in the administration that I have kept the political and the administrative separate, clearly I am a political person. And as Senator Eagleton said even on one occasion, yes, you are known as a pro, you can count the votes.

Well, Senator Eagleton, I have to admit I can count the votes, and I don't believe that I can be confirmed by this committee. And therefore I withdraw my nomination—or withdraw my request for reconfirmation—with my head held high and in the belief I did the best I can, and that there is a disagreement on issues, which is a legitimate disagreement in American politics. I believe that the President deserves the right to name a head of the Office of Personnel Management who will carry out his policies. I believe I did that faithfully and with all honor. But I believe it is time for the President to send a new name to the Senate.

And I would end my statement there. I am fully willing to answer questions, but depending upon the Senate's—the committee's—decision, you may wish to allow my wife and son and me to resume private service relatively expeditiously. Thank you.

[Dr. Devine's prepared statement, with attachments, follows:]

TESTIMONY
BEFORE THE
COMMITTEE ON GOVERNMENT AFFAIRS
UNITED STATES SENATE

BY

DONALD J. DEVINE,

NOMINATED TO BE DIRECTOR OF THE
U.S. OFFICE OF PERSONNEL MANAGEMENT

June 6, 1985

I first would like to thank the members of the Committee for holding this additional hearing to provide me further opportunity to support my renomination to be Director of the U.S. Office of Personnel Management.

I was honored when President Ronald Reagan asked me to serve again as Director, and I have appreciated his continued support. Reasonable men and women can differ over the policies I have pursued as Director, but few can deny that I have advanced the President's proposals to reform personnel management. As the head of one employee association--who normally wears a Democratic donkey tie pin--said, after otherwise disagreeing with me: "I'll give him credit, though. He's one of the most effective Directors I've ever seen, and I've been around for forty years." In any event, I have attempted as Director of

OPM to manage the civil service as efficiently and fairly as I could.

The results of my stewardship at OPM speak for themselves. Through fiscal year 1985, I have saved $6.4 billion administratively, and an additional $2 billion through legislation supported by the Administration, and passed by Congress. Over the next five year budget cycle, the savings will total well over $20 billion. At OPM, we have lowered staff levels primarily through attrition, by 22%, and are providing better service, more quickly, and at lower unit cost. As one of your colleagues, Senator Proxmire said, while not always agreeing with me, "There is no question that Dr. Devine has done a good job of holding down the cost of his agency operation." Senator Proxmire even said that he hoped that "we can learn from Dr. Devine what his secret is."

Our accomplishments have been recognized by taxpayers and taxpayers' groups, including the National Taxpayers' Union, the National Tax Limitation Committee and many other such groups. Other non-partisan organizations, such as the National Council of Technical Service Industries, the United Way of the National Capital Area, and the Georgia Association of United Ways, have also supported my renomination. Editorial opinion in newspapers across the United States has urged that I be reconfirmed as Director, including the Detroit News, the Atlanta Constitution, the Wall Street Journal, the Richmond News Leader, the Dallas

Morning News, etc. I appreciate this broad based support.

Over the past four years, the Director of OPM has been subjected to unusually close media and Congressional review. As a result, all my actions as Director are on the record. One op-ed newspaper column, while disagreeing with many of my actions, acknowledged that "traditional standards for reviewing Presidential appointments hold that the only grounds for denying confirmation are evidence of illegal, immoral or unethical behavior, although a good case can also be made with proof of incompetence. None of these circumstances apply here."

Of course, it is the obligation of the Senate to review closely all aspects of a nominee's personal and professional life. This hearing has been held specifically to discuss the transfer of authority that took place after my term as Director expired after March 25, 1985. On that day, Deputy Director Cornelius and I discussed the creation of the position of Executive Assistant to the Director. She then signed a Standard Form 52, to which a Position Description was attached, thereby establishing the Executive Assistant position and setting its duties. The Position Decription outlining my duties read as follows:

> "Under the direction of the Director, [Devine] is responsible for the general administrative management and the general direction and planning activities of OPM."

Immediately afterwards, this decision document was again discussed at a meeting with the Senior Policy Staff, which included Ms. Cornelius. For four weeks OPM operated openly under this arrangement. On May 1, 1985, when the arrangement was deemed no longer tenable by Acting Director Cornelius, I agreed to resign.

To precisely assess how OPM functioned during this period, this Committee requested all major decision documents acted upon at OPM between March 25 and May 3, 1985. A graph summarizing those documents is attached to this testimony. It shows that of the 93 major documents considered, 55--a clear majority--were executed by Acting Director Cornelius. Of these, 18 were acted on without any review by the Executive Assistant at all. In addition to the 55, 25 were either returned to or approved by other OPM officials. For myself, I signed only 7 documents--less than 8% of the total--after my term expired. Seven of 93 is not an unusual number for any executive to sign during this period of time especially considering 25 were acted upon by other OPM officials and that the Deputy Director signed an important contract on March 25th, before she became Acting Director.

What were the items I signed? They included the following: two pieces of correspondence, including a letter to Mrs. Reagan; authorization for internal emergency hiring authority; a quarterly report on the employee awards program; approval of a recommendation from the General Counsel concerning his intervention in a case before the Merit Systems Protection Board; a review of a memorandum to the Executive Assistant concerning the Federal Prevailing Rate Advisory Committee; and authorization for early out retirements at the Small Business Administration. These can hardly be called fundamental decisions and clearly show that I was not "running the agency" during the period after March 25th. Acting Director Cornelius clearly made the major decisions.

Congress was also aware of this arrangement. On March 26, 1985, this Committee was hand delivered a press release announcing the establishment of the Executive Assistant position and the Acting Director's appointment of me to that position. This release was also sent to all Members of Congress. At the previous confirmation hearing on April 2nd, Senator Eagleton asked me if I could submit a report "as Executive Director to the Acting Director" (p.161). This Committee, through its Investigations Subcommittee, asked me to testify even though I advised that I was no longer Director. The House of Representatives also had me testify on April 2nd knowing that my term had expired.

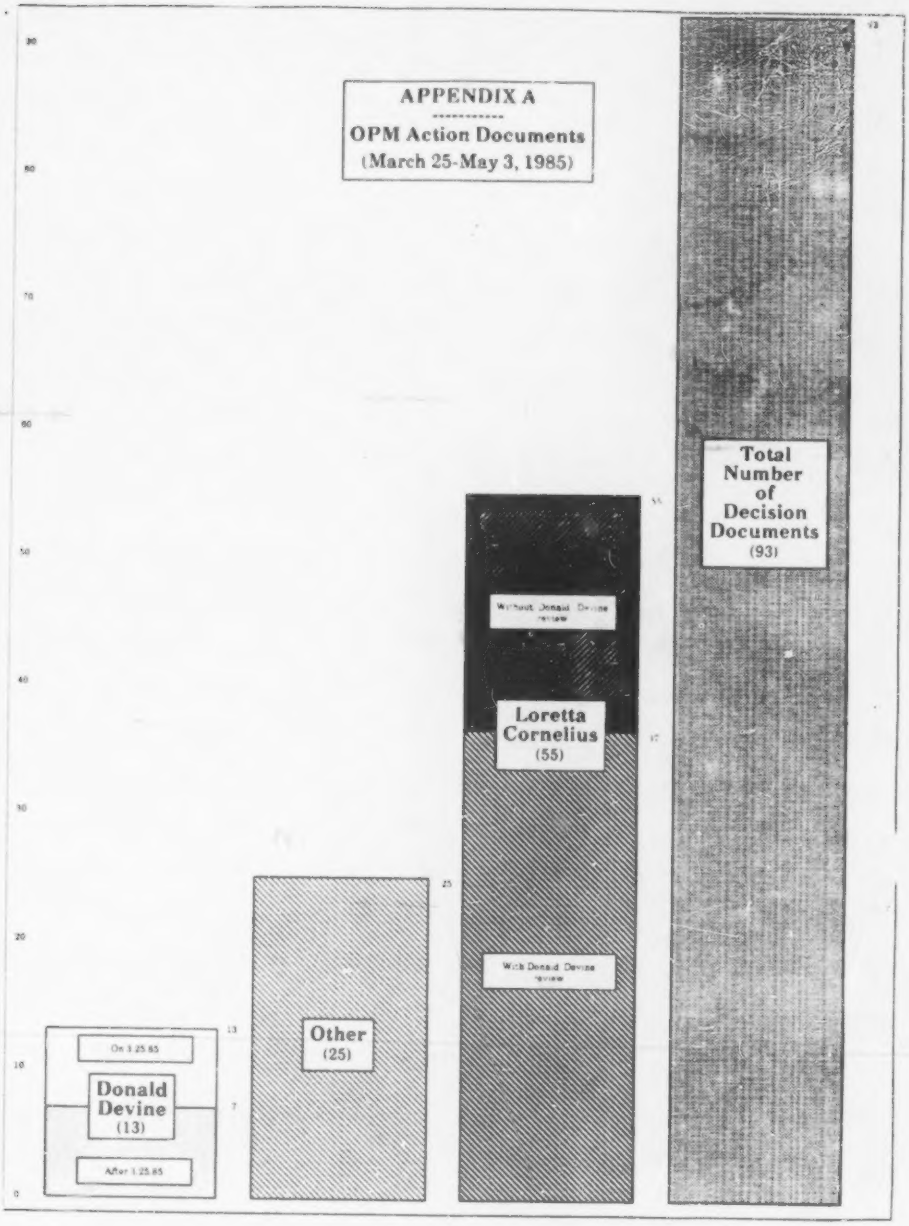
Let me now turn to the question which has been raised regarding the legal status of the delegation. Senior OPM staff and I understood that the Senate might not complete its deliberations on my renomination before my term expired on March 25. I consulted extensively with the OPM General Counsel prior to March 25, and he advised me that actions we took were legal. Subsequent to my resignation from the Executive Assistant position, I asked the prestigious Washington law firm of Covington & Burling to review the legal status of our actions. They, too, found them legal.

As I have previously noted, the decision document creating the position of Executive Assistant contained a position description that spelled out its duties and responsibilities. (see copy below). Moreover, Ms. Cornelius attended several senior staff policy meetings where the post-March 25 working arrangements were discussed. I believe, in good faith, that Ms. Cornelius and other senior OPM staff fully understood our decision, and that I was to work, in the words of the Position Description, "under the direction of the Director", Ms. Cornelius.

Moreover, please bear in mind that the delegation was strictly a housekeeping measure, devised to protect Agency actions from possible subsequent legal challenge. In a letter to the Wall Street Journal, Senator Eagleton has stated: "In violation of the law, Mr. Devine has signed, over the title of Director, bulletins to the Federal Personnel Manual and notices to the Federal Register." As a matter of fact, the documents mentioned by Senator Eagleton were all signed before the 26th of March, but the delegation was designed to assure that accidental or incidental administrative error would not lead to legal problems for OPM.

I hope that I have explained to the Committee the actions I have taken both before and after March 25. The data clearly show that Acting Director Cornelius signed all significant documents during the period, and that I signed a miniscule proportion--all minor documents. My position as Executive Assistant is not at all unusual in the government. For example, Milton Socolar--who was asked to testify before this Committee--serves as Special Assistant to the Comptroller General, a very similar situation to mine. The establishment of the position of Executive Assistant was fully discussed with Deputy Director Cornelius in the presence of Senior Policy Staff at a meeting on March 25th, 1985. Our actions were taken only for the purpose of protecting the Agency, and ensuring efficient management over a short period of time.

The Office of Director of OPM is a very difficult position. A union leader in the federal service has privately admitted to me it is the most difficult job. I have done the best I could, and there have been notable accomplishments. All the actions taken were legal and proper, and with the best interests of the Agency at heart. I respectfully request that the Committee view this record favorably for my reconfirmation as Director.

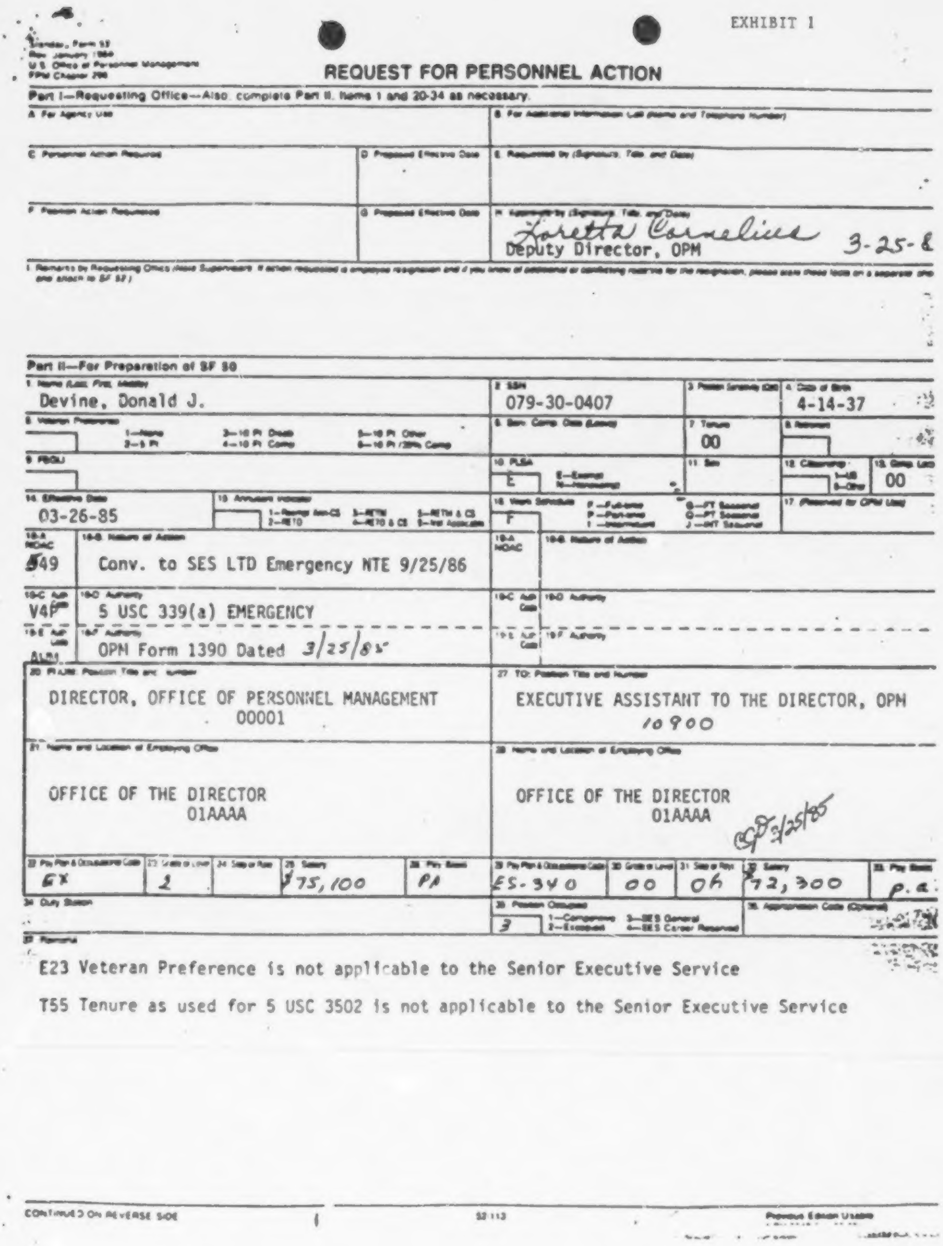


APPENDIX A

OPM Action Documents

(March 25-May 3, 1985)

EXHIBIT 1



Standard Form 52
Rev. January 1984
U.S. Office of Personnel Management
FPM Chapter 296

REQUEST FOR PERSONNEL ACTION

Part I—Requesting Office—Also complete Part II, items 1 and 20-34 as necessary.

A. For Agency Use

B. For Additional Information Call (Name and Telephone Number)

C. Personnel Action Requested

D. Proposed Effective Date

E. Requested by (Signature, Title, and Date)

F. Position Action Requested

G. Proposed Effective Date

H. Approved by (Signature, Title, and Date): Loretta Cornelius Deputy Director, OPM 3-25-8

I. Remarks by Requesting Office

Part II—For Preparation of SF 50

1. Name (Last, First, Middle): Devine, Donald J.
2. SSN: 079-30-0407
3. Position Sensitivity
4. Date of Birth: 4-14-37
5. Veteran Preference: 1—None 2—5 Pt 3—10 Pt Disab 4—10 Pt Comp 5—10 Pt Other 6—10 Pt /30% Comp
6. Serv. Comp. Date (Leave)
7. Tenure: 00
8. Retirement
9. FEGLI
10. FLSA: E (E—Exempt N—Nonexempt)
11. Sex
12. Citizenship: 1—US 8—Other
13. Comp Loc: 00
14. Effective Date: 03-26-85
15. Annuitant Indicator
16. Work Schedule: F
17. (Reserved for CPM Use)

18-A NOAC: 549
18-B Nature of Action: Conv. to SES LTD Emergency NTE 9/25/86
18-C Auth Code: V4P
18-D Authority: 5 USC 339(a) EMERGENCY
18-E Auth Code: ALM
18-F Authority: OPM Form 1390 Dated 3/25/85

20. FROM: Position Title and Number: DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT 00001
21. Name and Location of Employing Office: OFFICE OF THE DIRECTOR 01AAAA

27. TO: Position Title and Number: EXECUTIVE ASSISTANT TO THE DIRECTOR, OPM 10900
28. Name and Location of Employing Office: OFFICE OF THE DIRECTOR 01AAAA

3/25/85

22. Pay Plan & Occupation Code	23. Grade or Level	24. Step or Rate	25. Salary	26. Pay Basis	29. Pay Plan & Occupation Code	30. Grade or Level	31. Step or Rate	32. Salary	33. Pay Basis
EX	2		$75,100	PA	ES-340	00	06	$72,300	p.a.

34. Duty Station
35. Position Occupied: 3 (1—Competitive 2—Excepted 3—SES General 4—SES Career Reserved)
36. Appropriation Code (Optional)

37. Remarks

E23 Veteran Preference is not applicable to the Senior Executive Service

T55 Tenure as used for 5 USC 3502 is not applicable to the Senior Executive Service

CONTINUED ON REVERSE SIDE

Previous Edition Usable

Executive Assistant to the Director
ES-340
Office of Personnel Managment
Office of the Director

The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.

Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.

Is responsible for carrying out the following duties:

1. Directs the planning and development of an effective Government-wide personnel program for the purpose of providing the Federal Government with an effective and efficient career work force.

2. Directs OPM's activities in operating an effective Government-wide personnel program and in carrying out the other operating functions for which OPM is responsible.

3. Directs the administrative management of the activities and functions of OPM.

Senator **STEVENS**. Dr. Devine, I think you have taken the only honorable decision that could be made under the circumstances. You are right in terms of your ability to count the votes on this committee. I think your action demonstrates once again your loyalty to the administration.

Under the circumstances, if you withdraw your nomination, there will be nothing further pending before the committee. I don't believe there will be any questions. Members of course have the prerogative of comments.

I, too, am conscious of what you say about the impact of the general political process, and particularly the nomination process, on your family. Yours has been very supportive. I commented on that before. I am certain that they will support the decision you have made here today as the right one.

So, subject to the comments of the other members of the committee, as chairman I would say we don't have any further questions. Senator Eagleton, do you have a comment?

Senator **EAGLETON**. Yes, I have a brief statement, Mr. Chairman, but no questions.

Mr. Chairman, this has been a difficult ordeal for all participants. It has, of course, been especially difficult for Donald Devine and his family. I bear no personal malice toward Donald Devine but believe he has improperly operated as Director of the Office of Personnel Management in two basic areas. First, he has totally politicized the office. The hearing record is replete with facts substantiating this.

Second, his substantive administration of his duties has been woefully remiss. For example, his handling of the Federal Employees Health Benefits Program resulted in $2 billion being held in reserves while Federal employees paid higher premiums and received reduced benefits. The pay-for-performance regulations he actively supported had to be blocked by Congress repeatedly, and when Dr. Devine attempted to circumvent the Congress administratively, the Congress, not surprisingly, was upheld by the courts.

Finally, Mr. Chairman, in the most recent matters, he guided and participated in the illegal delegation of his duties as ongoing Director of OPM to himself as Executive Assistant to the Director. This was clearly outside the law. Donald Devine's own General Counsel Morris kept this matter—and Devine kept this matter—a deep, dark secret from the public, from the lawyers, from the Congress, and even from the Acting Director of the OPM, Dr. Loretta Cornelius. It was an act of illegality and stealth, unbefitting a high public official. As far as I am concerned, the matter is closed.

Senator **STEVENS**. Senator Cochran?

Senator **COCHRAN**. Mr. Chairman, let me say that the evidence in the record before the committee could permit conclusions that are not consistent with the statement of my good friend and colleague from Missouri.

I agree that Dr. Devine has made a decision today which demonstrates his continued loyalty to this administration, and I think it is the correct decision, and I know it was very difficult for him to make that decision. There are those who support the policies that he pursued in carrying out his duties as Director of the Office of Personnel Management.

It is obvious to everyone, though, that he didn't in every instance do things that were pleasing necessarily to all of those who work under the direction of that office. And he was not here engaged in a popularity contest, of course, but there are those who have praised his actions, and I think that there should be included in the record copies of editorials from the Dallas Morning News and the Atlanta Journal describing the way in which he has carried out the functions to restore fiscal integrity to the insurance program and other actions which have earned him praise from many throughout the country.

I ask that these be included in the record, Mr. Chairman.

[The articles referred to follow:]

[From the Dallas Morning News, May 23, 1985]

FEAR AND LOATHING IN WASHINGTON

(By William Murchison)

If memory serves, it was Ronald Reagan, not Walter Mondale, who last November carried 49 of the 50 states.

That being so, one wants to inquire why Washington streets should be starting to crimson with the blood of Reagan administration officials.

Ed Meese survived a year-long inquisition, becoming attorney general a few months ago. But recently two brand-new Education Department officials, Dr. Eileen Gardner and Larry Uzzell, found themselves at the center of a teapot tempest in Congress over their alleged insensitivity to the handicapped. (A strange accusation indeed for Dr. Gardner, a black Ph.D. from Harvard who formerly worked with handicapped children.)

To spare himself embarrassment, Education Secretary Bennett instructed the pair to get lost.

Over at the Occupational Safety and Health Administration (OSHA), director Robert Rowland is evidently on the chopping block, accused in media leaks from union leaders and old OSHA hands of insufficient ardor for the regulations his agency promulgates. Fancy that! A federal official less than enamored of regulation!

Meanwhile the Senate Government Affairs Committee sits on the reappointment of Donald Devine as head of the Office of Personnel Management. Here, in some ways, is the most infuriating tale of all.

Devine is the federal government's boss bureaucrat. During his first four years in office, he presided over a 6.7 percent drop in non-defense employment—the largest since the New Deal. OPM's own staff has dropped 22 percent. The federal employees health benefits fund has gone from deficit to surplus. Devine's various economies have saved the taxpayers $20 billion.

For the future he hopes to do something about the Civil Service Retirement System, the nation's third-largest entitlements program: more costly even than the military pension program. The taxpayers finance 86 percent of this.

Naturally Devine's passion for cost-cutting has not endeared him to the bureaucracy, or to those, chiefly liberals, who relish the chores the bureaucracy performs and who don't especially mind the cost.

"At the mere mention of (Devine's) name," according to the Washington Post, "federal workers grit their teeth and express fear and loathing."

Federal law sets the OPM head's term at four years. Devine's first four years being up, various Capitol Hill Democrats hope to get rid of him entirely. The Senate Government Affairs Committee is controlled naturally by Republicans, but one of those Republicans, Mathias of Maryland, is leaning against reconfirming Devine. Is it surprising to learn that Mathias' state is home to 200,000 federal employees?

It is hard to make war on a man who cuts the bureaucracy 6.7 percent, so Devine's foes have harped on his political campaigning last year. As it happens, a 1978 statute specifically exempts the OPM director from the law that forbids politicking by bureaucrats. Devine's Democratic predecessor, Alan Campbell, campaigned on several occasions. No Democratic senator is known to have objected.

But so what? Capitol Hill isn't the Philadelphia constitutional convention. The sport in which Devine's foes are engaged is called Reversing the Election Returns.

Yes, yes, Reagan swamped Mondale, but now he must govern—no easy task when liberal guerrillas in both parties, keep potshotting at his appointees, knocking off first one, then another. If nothing else, the potshotting distracts the White House from other chores.

Devine deserves reconfirmation on his own terms—in reward, that is, for a splendid job of controlling once-controllable costs. OPM needs just such a manager, and not merely for the next four years; for the rest of the century, actually.

So does Devine deserve reconfirmation for another reason. His president won the last election, and the one before that. Won them in order to accomplish specific things.

Devine's, and Reagan's, enemies don't like those things which is their democratic privilege. Overturning a mandate—that's nobody's privilege but the voters'.

[From the Atlanta Journal, May 23, 1985]

DON'T GET RID OF OPM'S DONALD DEVINE, CLONE HIM

(By Durwood McAlister)

The late Sen. Paul H. Douglas of Illinois once offered a graphic simile to explain the difficulty of controlling government expenses. "As groups win their battle for special expenditures, they lose the more important war for general economy," he wrote. "They are like drunkards who shout for temperance in the intervals between cocktails."

In Washington, the drunkards have been in charge so long that the entire nation is suffering from a gigantic hangover and desperately looking for a way to cure its throbbing deficit.

But one man, who took seriously Ronald Reagan's promise to cut federal expenses, has come on like Carrie Nation.

Donald Devine, director of the Office of Personnel Management, took the pledge and has lived up to it. Consider some of his accomplishments.

When he took over at OPM, the federal employees health benefit fund showed a deficit of $440 million. Devine's reforms have turned that into a $2 billion surplus.

His efficiencies have trimmed $10 million from his own department's budget between fiscal 1981 and 1985. He has trimmed the number of OPM employees by almost one-third, 90 percent of them through attrition.

He has cracked down on disability retirement abuse, reducing the number of such retirements by 40 percent.

According to figures compiled by OPM, changes instituted and proposed by Devine could save taxpayers an estimated $44 billion by 1986.

Unfortunately, nobody is so despised by drunkards as a true-believing preacher of temperance and Devine's cost-cutting crusade has evoked a firestorm of anger from those who belly up to the federal bar.

In order to continue his work, the controversial OPM director must now obtain reconfirmation from the Senate; and that may not prove to be an easy task.

Ironically, one of those leading the attack on Devine is Sen. Thomas Eagleton. About two years ago, Eagleton bewailed himself on the difficulty of ferreting out waste in government. "There has never been a line item labeled 'fraud, waste and abuse' in the federal budget waiting to be red-penciled," he said then.

But now that someone has shown up who has proven himself capable of tracking down "fraud, waste and abuse" and doing something about Eagleton wants to get rid of him.

His excuse? The Missouri Democrat claims that Devine violated the Hatch Act by making campaign appearances for Republican candidates in 1982 and 1984, thus politicizing the OPM. This is the only criticism Devine's opponents have been able to come up with.

And that charge ignores the fact that the OPM director was specifically exempted from Hatch Act restrictions when the job was created by the 1978 Civil Service Reform Act. It also conveniently forgets that Jimmy Carter's OPM director, Alan Campbell, indulged in the same sort of partisan political activity.

The real reason for the attack on Devine is that his zealous reforms have been painful to politically powerful civil service employee groups. Those groups are understandably making themselves heard with a loud voice. But the taxpayer should have a voice, too.

And what they should be saying is, "Don't fire Don Devine. Clone him."

Senator **Stevens**. Thank you very much. Do any other members have a comment to make? Senator Gore.

Senator **Gore**. Mr. Chairman, I agree with you that there is no point in pursuing questions. But I would like to say that I believe Dr. Devine has made the right decision. I want to wish him and his family well in the future.

I want to say that I believe Senator Eagleton and Chairman Stevens, and all the members of this committee, and the staff have shown that confirmation hearings do not have to be a routine, rubberstamp process that fails to go into significant questions; questions that need to be explored fully. I want to commend all of those who worked so hard during this long and arduous hearing.

Senator **Stevens**. Senator Levin, do you have a comment?

Senator **Levin**. Thank you.

Dr. Devine, as you know, I have been disturbed by how partisan and how political you made the office. You and I have spoken in my office about that. But the testimony of Dr. Cornelius yesterday was more than disturbing, it was devastating.

I believe the central facts regarding the delegation issue were as follows: Prior to March 25, you, Morris, and Hunt discussed the title and the duties of your job, and what your job was to be after that date. During those discussions, Hunt objected to the delegation document as first drafted and objected to the title of Executive Director.

The duties and the title were significant. They were discussed and you knew they were significant. You presented Dr. Cornelius with two options, two title options. She rejected one of the titles, the title of Executive Director.

You said this morning that there was no intent to hide the large scope of what your position was to be, and that is true. But there was a failure on your part to disclose to Dr. Cornelius the larger scope of the delegation document. The delegation was not a housekeeping matter, as your statement argues. The delegation was so important that the law required that it be shown to her.

Mr. Hunt had the duty to show that delegation document to Dr. Cornelius under your own manual. You told Mr. Hunt that you would take care of it, according to his testimony. You didn't do so. When she confronted you with it 1 month later, she testified that you said it slipped your mind. Now you say it was a housekeeping matter.

Dr. Devine, I believe that you consciously did not show her the delegation document.

When you were confronted by Dr. Cornelius, she says that you told her that the revelation of that delegation document would be damaging to your nomination, and she says that you asked her if she couldn't say that she saw the delegation. Her testimony was riveting and highly relevant to our judgment, and I believed her.

The central question, as you sense it this morning, correctly, is whether you handled the delegation matter deceptively in not disclosing the delegation to her and then suggesting that she say she knew about the delegation when she had told you that she didn't.

In fact, she was so upset about it that when she learned about it, she was going to fire you.

Dr. Devine, you reached a correct decision in withdrawing. It is correct for yourself, it is correct for your family, and I think it is correct for the Government. I am glad that you reached the decision that you did and it speaks well of you that you reached that decision. And I know that your family is proud of you for reaching that decision. I reached the conclusion I did in my good conscience, just as you reached the decision you did in your good conscience. I wish you and your wife and your kids all the best.

Senator STEVENS. Senator Glenn, any comments?

Senator GLENN. No comments, Mr. Chairman.

Senator STEVENS. This hearing is adjourned. Thank you very much.

[Whereupon, at 10:55 a.m., the committee was recessed, to reconvene subject to the call of the Chair.]

New odd Page

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PATRICIA SCHROEDER
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Congress of the United States
House of Representatives
Washington, D.C. 20515

ARMED SERVICES COMMITTEE
POST OFFICE AND CIVIL SERVICE COMMITTEE

April 25, 1985

Senator William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

It has come to my attention that, at the hearing of April 2, 1985, on the nomination of Dr. Donald J. Devine to be Director of the Office of Personnel Management, Senator Stevens stated that Dr. Alan K. Campbell made campaign appearances on my behalf while he was Director of the Office of Personnel Management. This is untrue. Dr. Campbell never campaigned on my behalf.

I would appreciate your placing this letter in the record at the point of Senator Stevens' statement.

With kind regards,

Sincerely,

Pat Schroeder

PATRICIA SCHROEDER
Member of Congress

American Postal Workers Union, AFL-CIO
817 Fourteenth Street, N.W., Washington, D.C. 20005 • (202) 842-4200

April 2, 1985

The Honorable Willam V. Roth, Jr., Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

The Honorable Thomas F. Eagleton, Ranking Member
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Ranking Member:

Please accept the attached testimony for the record on today's hearing concerning the renomination of Dr. Donald Devine to be Director of the Office of Personnel Management.

Sincerely,

Moe Biller

Moe Biller,
President

TESTIMONY OF MOE BILLER,
PRESIDENT
AMERICAN POSTAL WORKERS UNION, AFL-CIO

Mr. Chairman and Members of the Committee, I understand that the Senate may act in the near future on the renomination of Mr. Donald J. Devine as Director of the Office of Personnel Management. On behalf of the 325,000 members of the American Postal Workers Union, - I urge that you not approve Mr. Devine's nomination.

This Administration took office in 1981 on an anti-government and particularly anti-public worker platform. The positions taken by this Administration were not particularly new. Over the years, demagogues from nearly all political perspectives have used public service workers as scapegoats and punching bags when they encountered difficult public policy problems. What is new is the scale at which this administration has tried to demoralize, and discourage public workers and divert them from performing their jobs effectively.

Past Administrations, both Republican and Democratic have shown some concern for the proper functioning of federal agencies and the need to recruit and retain a dedicated and high quality workforce.

This Administration has taken the opposite approach. From the beginning it has tried to bypass the normal process of reviewing federal programs and the agencies that conduct them and then submitting corrective legislation or instituting improved procedures where it felt adjustment was necessary. Instead, it has sent in the wreckers - those whose assignment was not to govern, but rather to dismantle, discredit and destroy. When this Administration does not like an agency or a program, it appoints people to head it who are crooks, incompetents, lawbreakers, or morale busters. These appointees then spend their entire time in office trying to figure out how to obstruct, slow down, or ignore the legal mandates and reponsibilities with which their agencies are charged. Their sole task becomes one of trying to make agencies perform less and less well. Vital functions of government are discredited, and a self-fulfilling prophecy comes true: government can't function properly because it is being led by people who don't want it to function properly.

Donald Devine, charged with the responsibility of assuring appropriate personnel policies for the federal workforce, has been a primary mover in the effort to degrade government service. After you gave consent to his original nomination, he entered the house of government with sledge hammer swinging.

Instead of being an advocate to the President of the sort of changes in pay, personnel policies, and benefit packages that would continue to attract and retain dedicated, trained, and hard-working public service workers, Mr. Devine has been an apologist and instigator of policies to remove all the incentives for public service. An excellent example of the Director's approach is the outrageous, totally undocumented "quit rate" theory for setting pay for federal workers. The Director's theory is that since federal workers aren't jumping over the fence in droves to get away from federal service, then it must be okay to punish them further by taking the axe again and again to their pay and benefits. It is a clear example of how this Administration wants to push public workers to the wall. That they aren't leaving in droves is a tribute to their dedication. At this rate, with this Director continuing to recommend personnel policy to the President, I can't guarantee how long that dedication will last.

Another example of how Director Devine's administration of OPM has been destructive of the total compensation package of postal and federal workers was the predatory actions of OPM during negotiations with Federal Employees Health Benefits carriers over the 1981 and 1982 open seasons. At his direction, OPM negotiators embarked on a deliberate policy of trying to force benefit reductions in the health insurance plans and to manipulate the formula for determining the government's contribution for FEHBP, by driving enrollees from the two largest employee organization plans. In addition, the Director ordered cancellation of the 1981 open season. OPM's actions were predatory for both FEHBP enrollees and the APWU Health Plan and taken with little regard for the severe impact they would have on the health care of postal and federal employees.

In order to get some measure of the impact of OPM's action, the APWU requested a study of the dollar loss to its members. The respected economic analysts who performed the study estimated that each postal worker lost $830 in health benefits from 1982 to 1984 due to the change in the Big Six memberships and the cancellation of the open season.

These examples are just two of the many punches thrown at postal and federal workers. I urge you to turn back this assault on the very foundations of public service by withholding approval of this Administration's nomination until a more suitable nominee is offered.

FAIR

FUND FOR ASSURING AN INDEPENDENT RETIREMENT

Vincent R. Sombrotto, *Chairman*
Paul W. Newton, *Treasurer*
Sandra Sue Adams-Choate, *Secretary*

Member Organizations
- American Federation of Government Employees
- American Foreign Service Association
- American Postal Workers Union
- Epsilon Sigma Phi
- Federally Employed Women
- Federal Professional Association
- Graphic Communications International Union
- International Federation Professional and Technical Engineers
- International Union of Operating Engineers
- Military Sea Transport Union SIU
- National Association of ASCS County Office Employees
- National Association of Air Traffic Specialists
- National Association of Federal Veterinarians
- National Association of Letter Carriers
- National Association of Postal Supervisors
- National Association of Postmasters of the United States
- National Association of Retired Federal Employees
- National Federation of Federal Employees
- National Labor Relations Board Union
- National League of Postmasters of the United States
- National Rural Letter Carriers Association
- National Treasury Employees Union
- Organization of Professional Employees of the Department of Agriculture
- Service Employees International Union
- United States Air Traffic Controllers Organization

April 3, 1985

Senator Roth, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the 27 member organizations of FAIR (Fund for Assuring an Independent Retirement) we voice our opposition to Dr. Donald Devine, who unfairly targets the pay and benefits of active and retired postal and federal employees.

These benefits have been short term budget savings. But Dr. Devine's short term approach threatens the long-term integrity of the various pay and compensation systems of the federal government. Many billions have already come out of these programs yet the deficit continues to rise unabated.

Dr. Devine's budget proposals would drastically restructure the Civil Service Retirement system for those currently working under the system by changing the retirement age, changing the computation formula and means testing future COLAs. This restructuring is ill-timed and produces no appreciable budget savings in FY'86. Its effect, however, on the retirement system which is in a state of transition as a result of Congressional action to bring postal and federal employees under Social Security, would be devastating.

In addition, Dr. Devine's budget also proposes to cut federal pay by 5%. President Reagan tells us we are in a period of sustained growth but none of that growth is evident in his economic proposals for his own employees. A pay cut has not occurred since the Depression of the 1930's because it has not been justified, and it is not justifiable today.

Finally, all Americans face a crisis in health care costs. This Administration is attempting to walk away from the problem by proposing a controversial health care system based on vouchers and rebates for its own employees.

It encourages people to obtain less costly but indeed less than adequate health care coverage. Rebates may be appropriate gimmicks on the car lots of America but they do not belong on the minds of federal employees and retirees making crucial health care decisions.

The scorecard on Dr. Devine is complete: he strikes out on every count. His tenure has been marked by controversy, confusion, demoralization and disintegration. We oppose his nomination and look forward to a replacement who could restore the integrity of the Office of Personnel Management.

Sincerely yours,

Vincent R Sombrotto
VINCENT R. SOMBROTTO
Chairman and President
of the Board of FAIR

NATIONAL ASSOCIATION OF LETTER CARRIERS
AFL-CIO

VINCENT R. SOMBROTTO
PRESIDENT

100 INDIANA AVENUE, N.W.
WASHINGTON, D.C. 20001
202/393-4695

TESTIMONY

OF

PRESIDENT VINCENT R. SOMBROTTO

NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO)

BEFORE

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

On

Nomination of Donald Devine

April 1, 1985

CONGRESSIONAL TESTIMONY

Mr. Chairman, my name is Vincent R. Sombrotto. I am President of the National Association of Letter Carriers, AFL-CIO, a labor organization of over 262,000 members who are either presently employed as city delivery carriers by the U.S. Postal Service or who are retired from such employment. I also am the Chairman of the Fund for Assuring an Independent Retirement, a coalition of 28 federal and postal unions and organizations. I request permission to submit a statement later on behalf of the coalition for the record.

As the elected representative of a 262,000 member organization, I have learned and studied the importance of managerial skills that are so vital to someone in my -- or Mr. Devine's -- position. Many of the skills can be boiled down to objectivity, efficiency, command and clarity.

But when I look at Mr. Devine's record, I see a shortage on all four counts. For example, objectivity. No matter what your personal beliefs, you must open your eyes when the facts contradict your beliefs. To do otherwise may be ideologically pure but it is managerially stupid.

A good example of Mr. Devine's "purity" is his insistence that federal employees are getting better benefits and retiring earlier than the private sector. Last year the Hay Associates' study, commissioned by the House Post Office and Civil Service Committee, determined that federal pay lags by 10.3% and total compensation by 7.2%. A recent report of the Pay Agent backed-up that report. Yet Mr. Devine still drones on about the dramatic advantages in public service.

Another example of Devine blindness is his insistence that federal employees retire earlier. On February 16, 1983 he said that "...the retirement age is so much earlier" for government employees. Studies show that the difference is age 62 for private sector and age 61 for public. What dictionary defines 1.6% as "so much earlier?"

He should check a recent study by the Conference Board, a business research organization. As reported in the Washington Post on January 23, 1985: "...more than three-fifths of the companies surveyed had pension provisions fostering early retirement." Yet Devine asserted on Feb. 26th, 1985, before the House Post Office Committee, that the federal government is the leader in early retirement -- a situation he wants to reverse.

I tried, unsuccessfully, to point out to Mr. Devine that we're talking about real people. Let's be objective. Mr. Devine termed our retirement benefits as "excessive and overgenerous" on February 26, 1985. Here are the facts: The average letter carrier with 30 years of service retiring in March, 1985 will receive an annual annuity of $12,647. If the retiree provides a survivor annuity and health program, the basic annuity is reduced to $10,788.48 per year. And that is subject to income taxes. Would anyone consider that "excessive and overgenerous?"

Mr. Devine has the same attitude toward the Federal Employee Health Benefits Program. Yet the Mercer report, which was issued in 1982, told Mr. Devine that government employees receive less health benefits. In case he missed that one, the GAO issued a 1983 report repeating those disturbing facts -- government employees earn 2nd class pay and overall benefits. Yet, here Mr. Devine goes again, two years later, rolling out the same bleak proposals based on the same misconceptions. As an administrator, how can he run a good shop if his facts are wrong?

So much for his objectivity.

I have always maintained that organizational standards of efficiency should start with the leader's office. Since 1981, however, FEHBP has been marked by unnecessary controversy, chaos and unprecedented benefit reductions and rate increases. Devine's inefficiency really came to prominence in 1983. In that year he caused chaos in the health system by arbitrarily reducing benefits, increasing premiums, threatening to terminate health insurance carriers, publishing brochures late and extending the selection dates.

Let's look at the command element of his leadership. First you need to earn the respect of your people. Yet Mr. Devine uses every opportunity to scapegoat employees by fostering the illusion of lazy bureaucrats living for retirement. He has an 18th Century philosophy; he believes there's a war between himself and his employees. As a leader, he fosters fear and mistrust. That is a Dark Ages philosophy which leads to constant confrontation. We live in an era of collective bargaining and mutually arrived at decisions.

His combative attitude also is reflected in his appearances before Congress.

If he shows that contempt and arrogance toward Congress, it doesn't take much imagination to see how he deals with employees. His inflexible and stubborn attitude proves that he thinks he's a prison warden, not an administrator.

How could Lee Iacocca get Chrysler on its feet if he constantly berated his employees? Instead we see Mr. Iacocca in ads shoulder-to-shoulder with the workers on the line. I fear for Mr. Devine's health if he tried doing that!

As for Devine's clarity of leadership, he has confused current letter carriers -- active and retired --who thought they had a retirement contract and guarantee from their government. Now they don't even know from year to year what their annuity will be. Our members devoted their lives to the mail service, but many come up to me and ask me, "Why is the government trying to take away my hard-earned benefits?" The government is becoming their biggest fear as their future becomes unclear. To me, it is morally repugnant to put fear into the lives of the elderly, as Mr. Devine does.

As I have demonstrated, as a leader, Donald Devine flunks the test. He is making the government into an employer of last resort by trying to ruin a well-thought out system.

In 14 years as a union leader I have never come across such a negative person. He does not understand the most basic things about human nature: that you have to feed people spritually as well as economically.

Mr. Chairman, the Congress, OPM and the 3.6 million active and retired government employees deserve better.

Thank you.

Public Employee Department AFL-CIO
815 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 • (202) 393-2820-21

KENNETH T. BLAYLOCK
President

VINCENT R. SOMBROTTO
Executive Vice President

ALBERT SHANKER
Secretary-Treasurer

JOHN J. SWEENEY
Executive Vice President

JOHN F. LEYDEN
Executive Director

STATEMENT

of the

PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

to the

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

APRIL 12, 1985

This is to submit the views of the Public Employee Department, (PED), AFL-CIO, whose membership includes twenty-four international unions representing over one million federal and postal employees, to the Senate Governmental Affairs Committee during its consideration of the nomination of Dr. Donald Devine for the office of Director of the Office of Personnel Management (OPM).

The PED stands in strong opposition to Dr. Devine's confirmation based on a review of his actions and proposals over the past four years. Dr. Devine has been guided by an ideology which unequivocally views government and its programs as being inimical to the public interest and has, thus, engendered an attitude of complete hostility toward the federal work force implementing those programs. That hostility has resulted in actions and proposals that work to destroy this nation's civil service system and the merit principles that system has been based upon. In pursuit of ideological goals, Dr. Devine has promoted with complete equanimity inaccuracies and questionable data to support his positions and he has used his office to evade Congressional intent and to unilaterally change the laws he is charged with upholding.

Myriad examples of Dr. Devine's lack of objectivity come to mind. For example, while virtually every reputable study of employee pay and benefits shows federal workers falling behind the private sector, Dr. Devine, in an attempt to justify pay and benefit cuts, has spent the last four years promoting the notion that federal pay and benefits are overgenerous. Dr. Devine insists that federal employees retire much earlier than in the private sector. The facts show that they retire one year earlier. Dr. Devine promotes cuts in what he labels excessive employee health benefits, while studies by GAO and Mercer found that federal employees earn second class health benefits.

In its report "Reforming Federal Pay" OPM sought to justify a federal pay cut by basing pay on quit rates, stating that federal quit rates are significantly lower than those in the private sector. OPM's use of data to support the notion that federal quit rates are comparatively low was so blatantly inaccurate and misleading that it forces us to question the integrity of the study. May we suggest that Dr. Devine's basic and false belief that federal employee pay and benefits are excessive and overgenerous led to the conclusion that federal quit rates must be very low and rendered him unable to distinguish fact from fiction?

Dr. Devine's actions over the past four years also illustrate an overall pattern that seeks to undermine collective bargaining and labor-management relations mandated under the Civil Service Reform Act. In these areas he has ignored the law in pursuit of ideological goals. On March 30, 1983 and again in July he published in the Federal Register a list of topics that are negotiable or non-negotiable, whose guidance in many instances ran counter to the Federal Labor Relations Authority and previous court decisions. On January 4, 1985, Dr. Devine issued regulations eliminating the right of employees to grieve within-grade increases, RIFs and pay retention under negotiated grievance procedures. The regulations exceeded OPM's legal authority.

These actions along with his attempt to design and dictate the cost of health benefits offered under the Federal Employee Health and Benefit Program in 1981-82 and his attempts to implement sweeping changes affecting promotions, merit pay and the applicability of the Fair Labor Standards Act to federal employees, demonstrate Dr. Devine's inclination to act counter to and in spite of Congressional or court action in pursuing ideological goals.

Our philosophical differences with Dr. Devine are not a valid criteria for this Committee's rejection of his nomination. Dr. Devine's disregard for the facts and the law in pursuing ideological goals, on the other hand, are. We therefore urge you to reject the nomination of Dr. Devine to the office of Director of the Office of Personnel Management.

STATEMENT OF
RONALD W. DRACH
NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
TO
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
APRIL 3, 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the 983,666 members of the Disabled American Veterans, I am pleased to provide the views of the Disabled American Veterans on the nomination of Dr. Donald J. Devine to a second term as Director of the Office of Personnel Management.

At the outset, Mr. Chairman, let me state that the Disabled American Veterans has a long-standing policy prohibiting the endorsement of any candidate for elected or appointed office. Given this policy, however, we would like to address the manner in which Dr. Devine has conducted the affairs of his office over the past four years as it relates to employment opportunities for our nation's veterans, especially those who were disabled in time of war.

Dr. Devine has certainly been a welcome change from his predecessor who made no apologies for the fact that he and his Administration opposed veterans' preference as we know it today. When Dr. Devine assumed the Office of Director of OPM, he established an immediate dialogue and open door policy with the veterans' organizations in order to discuss our concerns over federal policies governing veterans' employment.

We have always found Dr. Devine to be accessible. We have met with him or members of his staff on a regular basis to discuss matters of concern. Dr. Devine has repeatedly reminded federal departments and agencies of their obligation to our nation's veterans, relative to veterans' preference and other special appointing authorities for disabled and Vietnam era veterans. We believe that increased employment opportunities for veterans and disabled veterans have been realized as a result of these efforts.

All is not perfect, however, Mr. Chairman, and we believe that the policy of contracting out of certain federal jobs fails to continue the nation's commitment to a group of veterans who may need help the most.

Mr. Chairman, currently Section 3310, Title 5, U.S. Code, requires that certain jobs be provided to preference eligibles if such veteran eligibles are available. Those jobs are: guards, elevator operators, messengers and custodians. Because of OMB's policy of contracting out to the private sector jobs which are currently performed by federal employees, many of these most needy and deserving veterans will be without employment. In fact, many veterans have lost their federal jobs already.

Although the DAV, as well as other veterans' organizations, have consistently opposed contracting out of jobs held by veterans, that ominous policy as it relates to veterans under Section 3310 of Title 5 continues.

We have reminded Dr. Devine that contracting out of certain functions is merely a policy and should not supersede federal laws which have been in place for more than 40 years. We rightfully become disturbed when an Executive Branch policy takes precedence over federal statute.

We raise these concerns, Mr. Chairman, in order to present to the Committee the view that while Dr. Devine has spoken out strongly on behalf of veterans' preference, his actions, perhaps guided by the Administration, have not necessarily reflected his public stance.

If asked if we thought that veterans in the federal job market were better off today under Dr. Devine's leadership, than they were four years ago...our reply could only be that the jury is still out.

We do, however, appreciate Dr. Devine's openness and candor in dealing with issues confronting the nation's veterans. We have enjoyed an open line of communication with the Director's office and we find Dr. Devine to be approachable even when there exists known disagreement.

Mr. Chairman, that concludes our statement and we will be happy to respond to any questions for the record.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

THE COMMANDER-IN-CHIEF

1985 APR -3 AM 9:12

April 2, 1985

The Honorable Ted Stevens
Committee on Governmental Affairs
U.S. Senate
Washington, DC 20510

Dear Senator Stevens:

As your committee meets to consider the reconfirmation of the Honorable Donald J. Devine to serve another term as Director of the Office of Personnel Management, please be advised that the relationship between the Veterans of Foreign Wars of the United States and the Office of Personnel Management has, for the most part, been a candid and cooperative one during his tenure.

While there are a number of areas where the Veterans of Foreign Wars has disagreed with OPM's position, we have found Dr. Devine to have exercised prudent care in protecting veterans preference and maintaining priority for affirmative action programs designed to assist Vietnam-era veterans and disabled veterans entering the Federal work force.

In view of the foregoing, the VFW supports the reconfirmation of Dr. Devine.

Sincerely,

Billy Ray Cameron
BILLY RAY CAMERON
National Commander-in-Chief

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D. C. 20002 - 5799 ● AREA CODE 202-543-2239

[From the Washington Post, March 31, 1985]

CBS FIGHT A LITMUS TEST FOR CONSERVATIVES

(By Thomas B. Edsall and David A. Vise)

Raleigh, N.C.—A high-tech political machine armed with some of the most lucrative direct mailing lists in the country and backed by Sen. Jesse Helms (R-N.C.) has drawn the management of CBS Inc. into a fight for survival.

The contest pits CBS in an unprecedented takeover and public relations battle against an ideologically driven adversary that openly claims to be more interested in achieving political goals than in making money on the deal.

Regardless of the outcome of this battle, the Helms-CBS confrontation provides a litmus test of the ability of the conservative movement to translate the power of its affluent financial base into an ideological force in the marketplace. And it already is providing a look at some legal liabilities within the conservative political machine now under scrutiny by both government prosecutors and CBS lawyers.

The takeover bid by Fairness in Media, an ad hoc committee run by the political allies of Helms, was launched in January. Since then, CBS has hired a battery of top-dollar law firms with the goal of discrediting the North Carolina-based political machine in an attempt to uncover what it claims are improper political fund-raising and other activities that violate federal law.

As part of this effort, CBS already has linked officials of the Helms organization and its main lawyer in the takeover battle to a controversial tax-exempt foundation, The Pioneer Fund. The fund has financed research into "racial betterment" by scientists seeking to prove that blacks are genetically inferior to whites.

The decision by Helms to expand his activities beyond the arena of politics into the corporate takeover battleground grows out of a deep, long-standing animosity among conservatives toward major media outlets. Acquiring a large-circulation newspaper or a network "is something that has been a dream of conservatives for years," according to Howard Phillips, chairman of the Conservative Caucus and an ally to Fairness in Media.

Richard A. Viguerie, the conservative fund-raiser, said: "In order to accomplish what we want politically, there is going to have to be a change in the media." Viguerie said he is involved in an entirely separate venture with a group of "substantial" conservatives who have hired financial specialists to find prospective print and television media targets to buy or take over.

In the case of Fairness in Media, just days after the November election, one man, Thomas F. Ellis, the backroom architect of Helms' rise to political power, conceived of the attack on CBS as a way to capitalize on President Reagan's landslide victory, and on Helms' come-from-behind drive to win a third term in the Senate.

The bid for CBS has proved to be a gold mine of free publicity for Helms, who has piggybacked on the press' extensive coverage of both corporate takeovers and legal libel battles between public figures and the media. To gain an absolute majority of stock, supporters of the conservative drive would have to put up more than $1.5 billion, making Wall Street analysts very doubtful of the probable success of a conservative takeover.

These same analysts, however, believe the FIM bid has made CBS vulnerable to a takeover by a third party more interested in the economics than the politics of the company. Analysts point to the fact that the FIM publicity has drawn attention to how much more the assets of the company are worth than the current stock market price. CBS is vulnerable to a takeover because more than 80 percent of its stock is held by the public, two-thirds of it by institutional investors.

The public fight between CBS and Fairness in Media began Jan. 10, when FIM filed papers with the Securities and Exchange Commission indicating it would encourage conservatives to buy CBS stock. FIM also said it would try to change what it believes is a "liberal bias" in the network's news coverage.

FIM mailed a million letters, signed by Helms, to conservatives asking them each to purchase at least 20 shares of CBS stock, an unprecedented political effort to organize a large group of individual stockholders to influence network news coverage while generating enormous publicity for Helms.

FIM's filing with the SEC said the group was formed on Nov. 13, 1984, by three North Carolina lawyers, R.E. Carter Wrenn, Thomas F. Ellis and James Palmer Cain. The three all have close ties to Helms. Wrenn is executive director of the National Congressional Club (NCC), the nation's second-largest policical action committee, which supports conservative candidates for pubiic office. Ellis is chairman of NCC.

On Feb. 4, Rep. Philip M. Crane (R-Ill.) said that he was joining the FIM campaign, and on Feb. 8, FIM said in a new SEC filing that it was considering a proxy campaign to elect directors to CBS' board and also said it had begun conducting discussions with third parties about transactions to seek control of CBS.

The documents did not identify the third parties, but The Washington Post reported on March 20 that broadcasting magnate Ted Turner told CBS lawyers he had held discussions with Helms and FIM about launching a joint takeover bid for the network. Turner has since told The Washington Post that he does not have the money to make a bid.

On Aug. 28, 1982, Turner donated 2½ hours of prime time on his WTBS superstation to Helms and Crane for a television documentary called "KGB: The Lie . . . and The Truth." The program, an investigation into covert Soviet activities that threaten the United States, was produced by the Coalition for Freedom, a Helms-supported group, and hosted by Crane. It featured appearances by Helms and Sen. John East (R-N.C.).

CBS stock has skyrocketed since its battle with FIM began. On Jan. 10, the day FIM filed its initial papers with the SEC, CBS stock closed at 72½. On Friday, it closed at 109¾, driven upward not only by the Helms attack on the network but also by speculation in media company stocks following the announcement on March 18 that American Broadcasting Companies Inc. had agreed to be acquired by Capital Cities Communications Inc. for more than $3.5 billion.

The rise in CBS stock has added strong economic support to the Fairness in Media drive. Someone following the recommendation to buy 20 shares on Jan. 10 would, by last Friday, have realized a gain of $745, or 51 percent, on an investment of $1,450, excluding brokerage fees. CBS charges in its lawsuit against FIM that the group is "attempting to manipulate the market in CBS stock through statements intended to create the false impression that FIM's efforts will result in a tender offer or other conventional takeover of CBS."

Some Wall Street analysts said they believe one of the reasons why ABC Chairman Leonard Goldenson chose to sell the company to Capital Cities was to avoid being the target of a hostile takeover bid.

Last week CBS gave its shareholder list to FIM after the group agreed to restrict the use of the names. CBS said it refused to give FIM the list until it received assurances that the list would not be used for political fund-raising.

FIM said Friday it will not use the list to mail stockholders information or launch a proxy fight before CBS' regular annual meeting on April 17. FIM claims it is willing to fight CBS for as long as it takes to realize its goal of influencing the network's news coverage.

INSIDE HELMS' EMPIRE

Fairness in Media is the most recent addition to a multimillion-dollar political empire of corporations, foundations, political action committees and ad hoc groups built up over the past 12 years by Jesse Helms, Tom Ellis and Carter Wrenn.

The political-money machine Helms and his allies have established is conducting the drive to apply conservative pressure on CBS. It financed the $500,000 needed for the cost of the initial mailing, and it controls list upon list of donors who have shown repeated willingness to pull out their checkbooks when Helms writes letters to them about abortion, school prayer, forced busing and now the "liberal bias" at CBS.

There are two key organizations in this empire. The first is the National Congressional Club, a conservative political action committee that raised $9.8 million in the 1982 election cycle. In the 1984 cycle, the club raised $5.7 million while the Helms campaign committee raised $13.99 million, a record in a Senate contest. The Congressional Club financially eclipses North Carolina's Democratic and Republican parties, each of which operate on annual budgets of less than $500,000.

The second critical organization is a corporation called Jefferson Marketing, viewed by many as one of the most ingenious political inventions in recent memory. It is, in effect, a corporate organization geared to providing conservative candidates and causes the computerized technology of the 1980s.

Housed in a nondescript, three-story building in a North Raleigh office complex, Jefferson Marketing has absorbed much of the staff of the National Congressional Club and past Helms campaigns under the protective cover of a private corporation, and it has taken over such key activities as direct mail, staffed phone banks, automated telemarketing and the production and placement of commercials.

The critical importance of Jefferson Marketing in the political structure is reflected by the fact that the National Congressional Club, once the centerpiece of the

Helms organization, is now just a three-person operation—Carter Wrenn and two secretaries—operating out of a third-floor, corner office in Jefferson's headquarters. Jefferson, in the meantime, has grown to employ 170 people.

Similarly, Fairness in Media is barely a one-man operation: James P. Cain serving on a lawyer-consultant basis. FIM rents a makeshift office room from Jefferson Marketing and uses the same receptionist, Johnnie Dean, who also answers calls for the National Congressional Club and for Jefferson Marketing.

Without Jefferson Marketing, it would appear that the drive to persuade conservatives to buy CBS stock would be a paper tiger. Jefferson advanced Fairness in Media a $500,000 line of credit to finance the million-piece mailing and subsequent telephone follow-up calls, and it owns key lists of conservative donors targeted in the drive.

Linking all these and a host of other groups, however, is a system of interlocking directorates in which Ellis and Wrenn are consistently the central players.

Ellis is chairman of the National Congressional Club; principal stockholder and a board member of the tax-exempt, nonprofit Educational Support Foundation that in turn owns Jefferson Marketing and appointed the officers and directors of Jefferson Marketing; a "founder" of Fairness in Media, and chairman of the Coalition for Freedom, a tax-exempt foundation whose goal is to finance conservative-oriented television programs. Wrenn holds identical positions, except that he is executive director and treasurer of the National Congressional Club and treasurer of the Coalition for Freedom.

TALE OF TWO LAWSUITS

The Raleigh, N.C.-based conservative political machine that backs Helms and other conservative candidates for political office is under pressure from separate lawsuits brought by the Federal Elections Commission and CBS.

The FEC lawsuit filed last month charges that the National Congressional Club has used Jefferson Marketing to channel illegal contributions into a political campaign.

The FEC has charged that Jefferson Marketing Inc. has provided fund-raising, media and other campaign services to candidates at "less than the fair market value."

If a corporation, such as Jefferson Marketing, does not charge a campaign fair market value for its services, the corporation is making illegal contributions, because corporations cannot contribute to federal candidates and because the contributions were not reported, according to federal election law.

The FEC named R.E. Carter Wrenn, the National Congressional Club's executive director and treasurer, in its suit. Wrenn told Congressional Quarterly in 1982 that Jefferson Marketing, incorporated as a for-profit corporation, was "set up to have an absolute minimal break-even situation, and there's never been any profits or dividends."

Later, testifying under oath in 1983 in a deposition taken in connection with the FEC charges, Wrenn appeared to contradict his comments to CQ. In the sworn testimony, he said: "If Jefferson ever operated without a profit in dealing with a political entity, that would be a problem. So, I have always advised them . . . [to] always be sure to operate with a profit."

The FEC suit alleges that Wrenn, Ellis and other NCC officials control Jefferson Marketing, and that Wrenn has exercised "domination and control over the day-today operations of Jefferson Marketing. Thus . . . Jefferson Marketing and the Congressional Club are a single entity." A legal ruling to that effect would mean both Jefferson Marketing and the NCC have violated federal election laws.

Paralleling the FEC, CBS charges in its lawsuit that Congressional Club, Jefferson Marketing and other organizations controlled by Wrenn and Ellis have failed to disclose their active participation in the Fairness in Media attack on the network through contributions of funds and personnel.

"Although styled a proxy contest, FIM's efforts are in fact a vehicle to raise funds and publicize partisan political views and individual candidates," the CBS lawsuit says. " . . . Defendants' filings with the SEC fail to disclose the nature and extent of financial support being received by FIM from NCC and Jefferson Marketing."

The key in deciding who is right is a legal determination of whether or not FIM and the other Raleigh, N.C.-based political committees supported by Helms and controlled by Wrenn and Ellis, are, in reality, one organization.

Ellis refused to discuss the controversy. "I do not talk to reporters. I've got a policy," he said. Wrenn, however, said in response to both the CBS and FEC accusations:

"Our point is twofold: The FEC has argued that because of my role in the club and the Educational Support Foundation, that makes Jefferson Marketing a political entity and not a for-profit corporation. . . . We basically counter-argue that they have separate bank accounts, separate tax accounts, separate business purposes. . . . What we have disputed with the FEC is they want Jefferson Marketing to file federal reports on their income and expenditures. We don't think they have the right to require that."

MATERIAL SUBMITTED FOR THE RECORD

TABLE OF CONTENTS

Item No.	Date	Description
1	March 25, 1985	Position Description for Executive Assistant to the Director Signed by Donald J. Devine
2	March 25, 1985	Request for Personnel Action (Form 52) Transfer Donald J. Devine to the position of Executive Assistant to the Director Signed by Loretta Cornelius
3	March 25, 1985	Memorandum - Delegation of Authority From: William M. Hunt To: Donald J. Devine
4		Original Delegations of Authority
5	May 3, 1985	Memorandum - Delegations of Authority and Line of Succession Instruments Relating to the Executive Assistant to the Director From: Joseph A. Morris To: Clifford J. White
6	May 1, 1985	Memorandum - Abolishing the position of Executive Assistant to the Director From: Loretta Cornelius To: William M. Hunt
7	May 1, 1985	Memorandum - Amending OPM Line of Succession From: Loretta Cornelius To: William M. Hunt
8	March 25, 1985	Memorandum - Change Line of Succession From: William M. Hunt To: Donald J. Devine
9	May 3, 1985	Memorandum - Attaching copy of Cornelius memo (#6 above) and requesting that this document be included in the OGC Index/Digest From: William M. Hunt To: Joseph A. Morris

- continued -

Item No.	Date	Description
10	March 25, 1985	Memorandum - Request for SES Limited Emergency Appointing Authority for the position of Executive Assistant to the Director From: George Nesterczuk To: Mary M. Rose
11	March 25, 1985	Memorandum - Standard Organizational Terminology From: William M. Hunt To: Donald J. Devine
12		Section 12.203 of OPM Manual entitled "Submission"
13		Section 12.202 of OPM Manual entitled "Delegations" (with hand-written amendments)
14	May 20, 1985	Letter from Donald J. Devine on the tracking of decision documents NOTE: Available in Committee files
15	March 26, 1985	Press Release - Cornelius Becomes Acting Head of OPM
16	May 17, 1985	Opinion from Joseph A. Morris on Lawfulness of the Appointment, Tenure and Authority of Donald J. Devine
17	May 14, 1985	Opinion from Covington & Burling
18	May 22, 1985	Opinion from Congressional Research Service

(#1)

POSITION DESCRIPTION (please read the instructions on the back)

1. Reason for Submission
☐ Redescription
☐ Reestablishment
☒ New

PD# of Position Being Replaced (if applicable)
☐ Other

2. Bargaining Unit Position?
☐ YES
☒ NO

3. Organizational Title
Executive Assistant to the Director

4. Recommended Pay Plan, Series and Grade
ES-340

5. Sensitivity
☒ Critical Sensitive (1)
☐ Non-critical Sensitive (2)
☐ Nonsensitive (3)

6. Supervisory/Management Responsibility
☐ Supervisor (SGEG)
☒ Manager (SGEG)
☐ Supervisor (5 USC 7103)
☐ Management Official (5 USC 7103)
☐ None of the Above

7. Fair Labor Standards Act
☒ Exempt
☐ Non-Exempt

8. Organization Location (Show up to five subdivisions)
U.S. Office of Personnel Management.

Office of the Director

9. If position is other than full performance level, indicate grade of full performance position and PD#, if one has been assigned.
☐☐ PD#:

10. Expected Duration of Position
☐ Less than one year
☒ Indefinite

Supervisory Certification. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violation of such statutes or their implementing regulations.

11. Signature of Supervisor
Date Signed (Month, Day, Year)

12. Typed Name and Title of Supervisor

13. Signature of Reviewing Official
Date Signed (Month, Day, Year) 3/21/85

14. Typed Name and Title of Reviewing Official
Donald J. Devine
Director

15. Duty Station
Washington, DC

16. Agency Position Number
D--10900APT

17. Subject to IA Action?
☐ YES ☒ NO

18. Employment/Financial Stmt. Required
☒ YES ☐ NO

19. Official Title
Executive Assistant to the Director

20. Official Pay Plan, Series and Grade
ES-340

21. Standards Used in Classifying/Grading Position and Dates of Standards Used

Classification/Job Grading Certification. I certify that this position has been classified/graded as required by title 5, U.S. Code, in conformance with standards published by the OPM or, if no published standards apply directly, consistently with the most applicable published standards.

22. Signature of Official Taking Action
see 13
Date Signed (Month, Day, Year)

23. Typed Name and Title of Official Taking Action
Donald J. Devine, Director

24. If Position Was Reviewed at Agency Level, Show Title, Series, and Grade Approved

25. Signature of Agency Official Taking Action
Date Signed (Month, Day, Year)

26. Typed Name and Title of Agency Official

27. Remarks

Information for Employees. The standards and information on their application are available in the personnel office. The classification for the position may be reviewed and corrected by the agency or the Office of Personnel Management. Information on classification/job grading appeals, and complaints on exemption from FLSA, is available from the personnel office or the Office of Personnel Management.

28. Employee certification of accuracy of the duties in this Position Description (optional)
EMPLOYEE'S SIGNATURE
Date Signed (Month, Day, Year)

29. Typed Name of Employee

30. Position Review	Init.	Date	Init.	Date	Init.	Date	Init.	Date	Init.	Date
a. Employee (optional)										
b. Supervisor										
c. Classifier										

31. TO BE COMPLETED BY THE PERSONNEL OFFICE

Organization Code | Position Number

0 1 A A A A 1 0 9 0 0 0 T P E S 0 0 3 4 0

E X E C U T I V E A S S T T O T H E D I R

0 0 0 0 E 1 0 3 8 5 M

U.S. Office of Personnel Management

OPM Form 1479 (6-81)

Executive Assistant to the Director
ES-340
Office of Personnel Managment
Office of the Director

The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.

Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.

Is responsible for carrying out the following duties:

1. Directs the planning and development of an effective Government-wide personnel program for the purpose of providing the Federal Government with an effective and efficient career work force.

2. Directs OPM's activities in operating an effective Government-wide personnel program and in carrying out the other operating functions for which OPM is responsible.

3. Directs the administrative management of the activities and functions of OPM.

Standard Form 52
Rev. January 1984
U.S. Office of Personnel Management
FPM Chapter 296

REQUEST FOR PERSONNEL ACTION

#2

Part I—Requesting Office—Also complete Part II, items 1 and 23-34 as necessary

A. For Agency Use:

B. For Additional Information Call (Name and Telephone Number):

C. Personnel Action Requested:

D. Proposed Effective Date:

E. Requested by (Signature, Title, and Date):

F. Position Action Requested:

G. Proposed Effective Date:

H. Approved by (Signature, Title, and Date): Loretta Cornelius Deputy Director, OPM 3-25-8

I. Remarks by Requesting Office (Note Supervisors: If action requested is employee resignation and if you know of additional or conflicting reasons for the resignation, please state these facts on a separate sheet and attach to SF 52.)

Part II—For Preparation of SF 50

1. Name (Last, First, Middle): Devine, Donald J.
2. SSN: 079-30-0407
3. Position Sensitivity (GS):
4. Date of Birth: 4-14-37
5. Veteran Preference: ☐ 1—None 2—5 Pt 3—10 Pt Disab. 4—10 Pt Comp 5—10 Pt Other 6—10 Pt /30% Comp
6. Serv. Comp. Date (Leave):
7. Tenure: 00
8. Retirement: ☐
9. FEGLI: ☐
10. FLSA: E E—Exempt N—Nonexempt
11. Sex:
12. Citizenship: ☐ 1—US 8—Other
13. Comp. Level: 00
14. Effective Date: 03-26-85
15. Annuitant Indicator: ☐ 1—Reemp Ann-CS 2—RETO 3—RETM 4—RETO & CS 5—RETM & CS 9—Not Applicable
16. Work Schedule: F F—Full-time P—Part-time I—Intermittent G—FT Seasonal Q—PT Seasonal J—INT Seasonal
17. (Reserved for OPM Use):

19-A NOAC: 549
19-B Nature of Action: Conv. to SES LTD Emergency NTE 9/25/86
19-C Auth Code: V4P
19-D Authority: 5 USC 339(a) EMERGENCY
19-E Auth Code:
19-F Authority: OPM Form 1390 Dated 3/25/85

19-A NOAC:
19-B Nature of Action:
19-C Auth Code:
19-D Authority:
19-E Auth Code:
19-F Authority:

20. FROM: Position Title and Number: DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT 00001
27. TO: Position Title and Number: EXECUTIVE ASSISTANT TO THE DIRECTOR, OPM 10900

21. Name and Location of Employing Office: OFFICE OF THE DIRECTOR 01AAAA
28. Name and Location of Employing Office: OFFICE OF THE DIRECTOR 01AAAA CG 3/25/85

22 Pay Plan & Occupation Code	23 Grade or Level	24 Step or Rate	25 Salary	26 Pay Basis	29 Pay Plan & Occupation Code	30 Grade or Level	31 Step or Rate	32 Salary	33 Pay Basis
EX	2		$75,100	PA	ES-340	00	06	$72,300	p.a.

34. Duty Station:
35. Position Occupied: 3 1—Competitive 2—Excepted 3—SES General 4—SES Career Reserved
36. Appropriation Code (Optional):

37. Remarks

E23 Veteran Preference is not applicable to the Senior Executive Service

T55 Tenure as used for 5 USC 3502 is not applicable to the Senior Executive Service

#3

United States Government
MEMORANDUM

Office of
Personnel Management

Date MAR 25 1985
In Reply Refer To

Your Reference

Subject Delegation of Authority

From William M. Hunt, Associate Director
for Administration

To Donald J. Devine
Director

This memorandum proposes an amendment to the Administrative Manual, page 12-09, Section 2, Authorities, part 12.202, Delegations. The amendment adds the following new paragraphs at the end of part 12.202, Delegations.

> The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified -- unless specifically revoked by the Director -- when the position of Executive Assistant to the Director is encumbered as follows:
>
> All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion.

I recommend that you approve the proposed amendment.

[✓ Approve] () Disapprove () Other

Donald J. Devine, Director

3/25/85
Date

CON 101-67-
OPM Form 63

#4

Delegations of Authority

Amendment to OPM Administrative Manual

On page 12-09, insert the following new paragraphs at the end of part 12.202, Delegations —

The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, are superseded when the position of OPM Executive Director is encumbered as follows:

All delegations of authority from the Director or Deputy Director are withdrawn and transferred to the Executive Director who may, in turn, redelegate authority at his discretion.

#5

United States Government
MEMORANDUM

**Office of
Personnel Management**

Subject: Delegations of Authority and Line of Succession Instruments Relating to the Executive Assistant to the Director

Date: May 3, 1985
In Reply Refer To:

From: Joseph A. Morris
General Counsel

Joseph A. Morris

Your Reference:

To: Clifford J. White
Assistant General Counsel
for Administrative Law

Transmitted herewith, for lodging in the OGC Index/Digest office, are copies of the following documents:

(1) The OPM internal delegation of authority, approved on March 25, 1985, by Donald J. Devine, as Director, relating to the Executive Assistant to the Director. You will note that the delegation, on its own terms, reaches only to the extent "not inconsistent with law." You will note further that nothing in it inhibits or frustrates the authority of the Director or Acting Director to modify or revoke the delegation. It is plainly of legal form and sufficiency.

(2) The OPM line of succession, approved on March 25, 1985, by Donald J. Devine, as Director. You will note that the line of succession unambiguously provides that the Director is succeeded by the Deputy Director; the Executive Assistant to the Director follows the Deputy Director in the line of succession and is subordinate to her.

Please touch base with Bill Hunt and make sure that he has copies of these instruments.

These documents are official agency records, are public in nature, and may be produced upon request to any requestor (under the Freedom of Information Act or otherwise).

#6

United States Government
MEMORANDUM

Office of
Personnel Management

Date MAY 1 1985
In Reply Refer To:

Your Reference

Subject: Executive Assistant to the Director Position

From: Loretta Cornelius
Acting Director
Loretta Cornelius

To: William H. Hunt
Associate Director
for Administration

Please prepare necessary documents to abolish the position of Executive Assistant to the Director as of the close of business Friday, May 3, 1985.

All internal delegations that relate to the position of Executive Assistant to the Director are revoked immediately.

CON 101-87-3
OPM Form 631
August 1980

#7

United States Government
MEMORANDUM

**Office of
Personnel Management**

Subject: OPM Line of Succession

Date: MAY 1 1985

In Reply Refer To

From: Loretta Cornelius
Acting Director
Loretta Cornelius

Your Reference:

To: William M. Hunt
Associate Director for Administration

Please amend the Administrative Manual, Page 12-13, Section 4, Positions in Line of Succession, Part 12.402, as outlined below.

Delete all ten (10) positions listed in the current issuance, dated September, 1984, and substitute the following five (5) positions:

1. Deputy Director
2. Associate Director for Administration
3. Associate Director for Compensation
4. Associate Director for Compliance and Investigations
5. Regional Director, Chicago Region

This change in the line of succession shall be effective as of May 1, 1985.

Please arrange for the immediate issuance of all necessary documents to reflect this change.

#8

United States Government
MEMORANDUM

Office of
Personnel Management

Date MAR 25 1985
In Reply Refer To

Your Reference

Subject Change in line of Succession

From William M. Hunt, Associate Director
for Administration

To Donald J. Devine
Director

Attached is a proposed amendment to the Administrative Manual, Page 12-13, Section 4, OPM Line of Succession, Part 12.401,Conditions of Use, reflecting recent position changes.

We have changed the name of the Assistant Director for Executive and Personnel Policy to Assistant Director for Office of Executive Administration to conform with the recent title changes. We have also included the position of Executive Assistant to the Director to the Line of Succession.

I recommend that you approve the proposed changes.

☑ Approved ☐ Disapproved ☐ Other

____
____
____

Donald J. Devine, Director

3/25/85
Date

SECTION 4. OPM LINE OF SUCCESSION

12.400 PURPOSE

This section describes who acts for the Office of Personnel Management (and under what conditions) in the absence of the Director.

12.401 CONDITIONS OF USE

The Director, OPM, has authorized the incumbents of the positions shown in part 12.402, in the order listed, to exercise the authorities of OPM, and to direct OPM's activities, under either of the following conditions:

1. During an emergency, if the Director, OPM, is not available. Upon assuming authority under these provisions the official so acting will immediately inform the President's headquarters. The official will succeed to the office and function as acting head of the OPM until appointed by the President or until relieved. However, when the official knows that an official higher in the line of succession is only temporarily absent, that official will not succeed to the office but will act for the Director until relieved.

2. During non-emergency conditions, if OPM temporarily does not have a Director. Normally, when the Director is absent temporarily, he or she designates an official to act as Director during the absence (usually that official will be the Deputy Director, OPM). If the Director has not designated someone to act in his or her absence, or if the person designated is also absent (without designating an official to act in his or her absence), the matter will normally wait until an appropriate official returns or has been appointed. When circumstances require prompt action, the situation does not qualify as an "emergency," and the matter at issue falls within the program responsibilities of a single associate director or head of other office, then that official will act for OPM on that matter. When circumstances require prompt action, the situation does not qualify as an "emergency," and the matter involves two or more program organizations, then the incumbents of the positions shown in part 12.402, in the order listed, will act for OPM on that matter.

12.402 POSITIONS IN LINE OF SUCCESSION

1. Deputy Director
2. Executive Assistant to the Director
3. Principal Assistant to the Director
4. Associate Director for Administration
5. Associate Director for Workforce Effectiveness and Development
6. Associate Director for Compliance and Investigations
7. Associate Director for Compensation
8. Associate Director for Staffing
9. Executive Assistant Director for Policy and Communications
10. Assistant Director for Office of Executive Administration
11. Regional Director, Atlanta Region *

#9

United States Government
MEMORANDUM

**Office of
Personnel Management**

Subject: Delegations of Authority and Line of Succession Instruments Relating to the Executive Assistant to the Director

Date: May 3, 1985
In Reply Refer To:
Your Reference:

From: William M. Hunt
Associate Director for Administration

To: Joseph A. Morris
General Counsel

Attached is a copy of a memorandum from Loretta Cornelius, Acting Director, revoking all delegations related to the position of Executive Assistant to the Director as of May 1, 1985.

Please include this document in the OGC Index/Digest office.

RECEIVED 3-25-85

#10

CEP [illegible]

United States Government
MEMORANDUM

**Office of
Personnel Management**

Subject Request for SES Limited Emergency Appointing Authority

Date

In Reply Refer To:

From George Nesterczuk, Chair
Executive Resources Board

Your Reference

To Mary M. Rose, Assistant Director
for Executive Administration

The Office of Personnel Management requests an SES Limited Emergency Appointment Authority effective March 26, 1985.

The position of Executive Assistant to the Director is needed to provide top level assistance in managing the agency and assure the implementing of the Administration's personnel goals and initiatives.

An OPM Form 1390 is attached.

Attachment

#11

United States Government
MEMORANDUM

Office of
Personnel Management

Date: MAR 25 198
In Reply Refer To:

Your Reference:

Subject: Standard Organizational Terminology

From: William M. Hunt, Associate Director
for Administration

To: Donald J. Devine
Director

This memorandum proposes an amendment to the Administrative Manual, page 12-07, Section I, Organization, Part 12.105, Standard Organizational Terminology.

The amendment adds the following to paragraph 4, Exceptions.

> Under Refer to Organization As, insert "Office of Director" above "Office of the General Counsel" and under Refer to Head As, insert "Executive Assistant to the Director" above "General Counsel."

I recommend that you approve the proposed amendment.

☑ Approve ☐ Disapprove ☐ Other

____

____

____

Donald J. Devine, Director — Date 3/27/81

SECTION 2. AUTHORITIES

12.200 PURPOSE

This section introduces the system of formal delegations of authority used by the OPM.

12.201 LEGAL AUTHORITIES

The OPM bases its authority to act on legislation and Executive orders. Chapter 1 of AM supplement 12-2, Authorities and Delegations Manual, cites the basic authorities, including those for organization and management of the OPM and those relevant to individual programs.

#13

12.202 DELEGATIONS

AM supplement 12-2, Authorities and Delegations Manual, also lists the delegations of authorities from the Director to associate directors; delegations of program authority from the Director to heads of other offices (chapter 3); delegations of program authority from the Deputy Director to regional directors (chapter 4); delegations of administrative authority from the Director to associate directors and heads of other offices (chapter 5) and from the Deputy Director to regional directors (chapter 6); and a format for redelegating administrative authority within groups and other offices (chapter 7). *

The supplement gives instructions for redelegating authority within a group, other office, or regional office, and for annually reviewing the currency of delegations. It describes how to submit changes, whether as a result of periodic review or other factors such as organization changes (see also 12.102, above). Organization, functions, and delegations of authority interrelate to such an extent that changes in one usually require changes in all. Each group and other office should therefore also review function statements and organization whenever it revises its delegations.

NEW

The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, are ~~superseded~~ when the position of OPM Executive Director is encumbered? as follows: Not inconsistent with law

modified -- unless specifically noted (in instruments and delegations of) by the Director --

All ~~delegations of~~ authority ~~from~~ of to the Director ~~or Deputy Director~~ ~~are~~ are delegated ~~withdrawn and transferred~~ to the Executive Director who may, in turn, redelegate authority at his discretion.

#12

12.203 SUBMISSION

? To submit changes to the delegations in AM supplement 12-2, prepare the proposed wording and, in a covering memorandum to the Deputy Director, OPM, explain the reason for the changes. Route the changes and covering memorandum through the Associate Director for Administration. The Administration Group will recommend to the Deputy Director, OPM, action on the proposal. *

* Groups and offices may consult with Management Systems Branch, Administration Group, prior to preparing proposed changes. This usually will speed consideration of the proposal submitted formally. *

United States
Office of
Personnel
Management
1900 E St. NW
Washington, D.C. 20415
News Unit, Room 5F10
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NEWS

March 26, 1985
Washington, D.C.

Contact:
Mark Tapscott

#15

CORNELIUS BECOMES ACTING HEAD OF OPM

Loretta Cornelius, Deputy Director of the Office of Personnel Management (OPM), announced today that she is assuming the position of Acting Director of OPM, while Donald Devine is awaiting confirmation by the Senate. "I look forward to the duties of chief executive officer during this interval. To assist me in my role as acting head of OPM, I have asked Dr. Devine to be my executive assistant. He will report to me and advise me on matters of policy and administration. Clearly, his experience over the past four years makes him the most qualified person to handle this important assignment during this transition. I ask all in OPM to assist me to provide continuity and to continue the record of efficient operations that Dr. Devine and I have established at OPM," concluded Cornelius.

#16

United States of America
**Office of
Personnel Management**

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To

Your Reference

May 17, 1985

MEMORANDUM FOR WAYNE A. SCHLEY
STAFF DIRECTOR
SUBCOMMITTEE ON CIVIL SERVICE, POST OFFICE, AND GENERAL SERVICES
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

FROM: JOSEPH A. MORRIS Joseph A Morris
GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

SUBJECT: LAWFULNESS OF THE APPOINTMENT, TENURE, AND AUTHORITY OF DONALD J. DEVINE AS EXECUTIVE ASSISTANT TO THE DIRECTOR OF OPM FROM MARCH 26, 1985 TO MAY 3, 1985

Introduction

On March 25, 1985, pursuant to 5 U.S.C. § 1102(a), the four-year term of office of Donald J. Devine as Director of the Office of Personnel Management (OPM) came to an end. In accordance with 5 U.S.C. § 1102(b), the Deputy Director of OPM, Loretta Cornelius, thereupon commenced to act as the agency's Director.

Mr. Devine was already the Director-Designate of OPM, having been nominated for a second term in office by the President of the United States on March 8, 1985. 21 Weekly Comp. Pres. Doc. 270, 273 (March 11, 1985). The President's instrument of nomination was received the same day by the Secretary of the Senate, 131 Cong. Rec. S2999 (daily ed. March 14, 1985), and was spread of record in the Senate on March 14, 1985. 131 Cong. Rec. S2911, S2999 (daily ed. March 14, 1985).

On March 26, 1985, Acting Director Cornelius appointed Mr. Devine as Executive Assistant to the Director. Mr. Devine served in that position until May 3, 1985, when his resignation from the office became effective. From May 4, 1985, until the present day, Mr. Devine has been a private citizen. He remains the Director-Designate of OPM; his nomination awaits the advice and consent of the Senate in accordance with Article 2, Section 2, Clause 2 of the United States Constitution.

You have asked me for my views as to the lawfulness of Mr. Devine's appointment, tenure, and authority during the period from March 26, 1985, to and including May 3, 1985. This memorandum responds to that request.

Statement of Facts

On March 26, 1985, Acting Director Cornelius executed an instrument, on Standard Form 52, entitled "Request for Personnel Action," initiating the appointment of Mr. Devine to the position of Executive Assistant to the Director. (A copy of that document is attached hereto as Exhibit 1). The same day, OPM's internal Office of Personnel and Equal Employment Opportunity memorialized the appointment by issuance of a notice thereof, on Standard Form 50, entitled "Notification of Personnel Action." (A copy of that document is attached hereto as Exhibit 2).

As described in those instruments, the post to which Mr. Devine was appointed was a limited-term emergency, non-career position in the Senior Executive Service, with a tenure not to exceed September 25, 1986. That position was created the previous day, on March 25, 1985, when Mrs. Cornelius, as the Deputy Director of OPM, executed OPM Form 1390, entitled "Executive Personnel Transaction." (A copy of that document is attached hereto as Exhibit 3).

In the well-established and widely-acknowledged usage of the Federal personnel system, the creation of a position is normally accompanied by the issuance of a "position description" that describes the particular powers, duties, and other principal characteristics of the job. Where an incumbent of the position is to exercise discretionary authority, and particularly where the position stands in relative proximity to the head of the agency, the position's establishment will also typically entail the preparation of a written "delegation of authority." Finally, where the position is a senior post within the agency, it may be expected and desired that its eventual incumbent should be available, on a temporary basis when occasioned by the absence or disability of the head of the agency, to act as the head. In such circumstances, the agency's internal line of succession will properly be modified to reflect the availability and authority of the position's incumbent to act as the agency's head in time of need.

Director Devine prepared or approved instruments of all three kinds on March 25, 1985, when he approved establishment of the position itself. First, he executed OPM Form 1479, entitled "Position Description," which set forth the following specific description of the position of Executive Assistant to the Director:

> The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.
>
> Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.

> Is responsible for carrying out the following duties:
>
> 1. Directs the planning and development of an effective Government-wide personnel program for the purpose of providing the Federal Government with an effective and efficient career work force.
>
> 2. Directs OPM's activities in operating an effective Government-wide personnel program and in carrying out the other operating functions for which OPM is responsible.
>
> 3. Directs the administrative management of the activities and functions of OPM.

(A copy of the Position Description is attached hereto as Exhibit 4).

Second, he approved a recommendation transmitted to him by William M. Hunt, Associate Director of OPM for Administration, which modified Part 12.202 of OPM's internal Administrative Manual as follows:

> The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified — unless specifically revoked by the Director — when the position of Executive Assistant to the Director is encumbered as follows:
>
> All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion.

(A copy of the Delegation of Authority is attached hereto as Exhibit 5).

Third, Mr. Devine approved another recommendation from Mr. Hunt, in consequence of which the title of OPM's "Assistant Director for Executive and Personnel Policy" was changed to "Assistant Director for Executive Administration" and, more pertinently, OPM's internal line of succession was amended such that the second in line of succession (after the Deputy Director), thitherto the Principal Assistant to the Director, became the Executive Assistant to the Director; the Principal Assistant to the Director became third in line, and the remainder of the line of succession was conformed accordingly. (A copy of the OPM Line of Succession as it stood prior to March 25, 1985, is attached hereto as Exhibit 6; a copy of the Line of Succession approved by Mr. Devine on March 25th is attached hereto as Exhibit 7).

In short, Deputy Director Cornelius established the Senior Executive position of Executive Assistant to the Director on March 25, 1985, and, the same day, Director Devine issued documents describing the position, vesting it with delegated authority, and placing it in the line of succession immediately following the position of the Deputy Director. He left the position vacant, and it remained vacant until the following day, when, Mr. Devine's term having expired the night before, Acting Director Cornelius encumbered the position with Mr. Devine.

Analysis

It has been suggested that these arrangements were legally defective in one or more of the following respects: that the authority delegated to Mr. Devine in his capacity as Executive Assistant to the Director was impermissibly broad; that Mr. Devine's position impermissibly encroached upon the authority of the Deputy Director; and that Mr. Devine's appointment to the position was an impermissible attempt to circumvent the intent of Congress that Directors of OPM not hold-over in office when their four-year terms in office have ended. I shall treat each of these issues in turn.

Breadth of Delegation

OPM's organic statutes provide, at 5 U.S.C. § 1103(a), that the functions vested in the Director of OPM "shall be performed by the Director, or subject to section 1104 of this title, by such employees of the Office [of Personnel Management] as the Director designates...." The plain meaning of this language is to confer power upon the Director to delegate all or part of his authority to subordinate officials of OPM. Reference to Section 1104 discloses the imposition of several conditions upon the performance of OPM's functions, but no restraint upon the authority of the Director to delegate the performance of those functions to his subordinates.

Indeed, 5 U.S.C. § 1104(a)(2) provides that "the Director may delegate, *in whole* or in part, *any function vested in or delegated to the Director*, including authority for competitive examinations (except competitive examinations for administrative law judges...), to the heads of agencies in the executive branch and other agencies employing persons in the competitive service...." (*Emphasis added*). If, subject only to the express reservation noted in the statute, the Director may delegate his functions *in whole* to the head of an entirely different agency, then, *a fortiori*, he may delegate them to his own subordinates.

OPM's Administrative Manual already contained broad grants of authority to subordinate OPM officials, including the General Counsel, the Inspector General, and the several Associate Directors, among others. Significantly, the Administrative Manual contained (and contains) *no* general delegation of authority from the Director to the Deputy Director. The organic statutes are of little help in adumbrating the *specific* functions and authorities of the Deputy Director, for they provide, at 5 U.S.C. § 1102(b), merely as follows:

> There is in the Office a Deputy Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. *The Deputy Director shall perform such functions as the Director may from time to time prescribe* and

> shall act as Director during the absence or disability of the Director or when the office of Director is vacant. (Emphasis added).

The facts are that the delegations of authority to the Deputy Director of OPM have been broad — virtually coextensive with the authorities of the Director — and yet informal. OPM's Administrative Manual contains a formal statement of duties delegated to each senior official of the agency under the Director — with the conspicuous exception of the Deputy Director. Since the creation of OPM in 1979, successive Directors and Deputy Directors have been in daily communion, dividing labor between them as necessary and convenient. They have effectively shared the power of the Director in common, subject, of course, to the ultimate power of the Director to make decisive dispositions in any case. Hence, the broad delegation of authority to the Executive Assistant to the Director is not without precedent in fact; it conforms precisely to the tacit and informal delegation of authority that has always been the possession of the Director's chief subordinate. Indeed, it represents a reasonable adaptation of the traditional relationship between the Director and the Deputy Director to the exigencies of a circumstance in which the office of Director was vacant; with the Deputy Director acting, by operation of law, as the Director, the Executive Assistant to the Director was needed to act, by operation of sound discretion, as the Deputy Director. The Delegation of Authority that is at issue here achieved precisely that result.

There can be no doubt that it was the intention of the Acting Director to create precisely such an arrangement. On March 26, 1985, Mrs. Cornelius announced in a formal statement to the press that she was assuming the position of Acting Director of OPM, "while Donald Devine is awaiting confirmation by the Senate." She was quoted, in pertinent part, as follows: "To assist me in my role as acting head of OPM, I have asked Dr. Devine to be my executive assistant. He will report to me and advise me on matters of policy and administration." (A copy of the news statement is attached hereto as Exhibit 8).

The language of the Delegation of Authority in question here mirrors that of Section 1104, referring to "[a]ll investments and delegations of authority to the Director...." See Exhibit 5. Importantly, it contains on its face the express provision that the delegations of authority contained in OPM's Administrative Manual are to be modified only to the extent "not inconsistent with law...." Ibid. This is consistent with the terms of the Administrative Manual itself, which provides that "All officers and employees of OPM should comply with the manual's provisions, unless those provisions conflict with public law, Executive order, or other external authority...." OPM Admin. Man., AM Supp. 12-2, Inst. 63 (March, 1985) at 1. Thus, the Delegation of Authority to the Executive Assistant to the Director contained a self-correcting provision that, on its own terms, invalidated any unlawful delegation of authority. What remained were, necessarily, lawful delegations of the Director's authority, to be exercised as permitted by 5 U.S.C. § 1103(a).

Encroachment Upon Authority of Deputy Director

As has been noted, OPM's organic statutes authorize the Director to delegate his functions to others. 5 U.S.C. §§ 1103 and 1104. It is well-established law that a delegation of authority "does not imply a parting with power by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself." 26A C.J.S. Delegation (1956). The true relationship between the Director, on the one hand, and a subordinate to whom he has delegated authority, on the other, is properly characterized as that of principal and agent. (To be sure, the Director is the agent of Congress and the President — and OPM thus an agency — with respect to the powers that they have vested in and delegated to him; but the agent is the sub-agent's principal. Restatement (Second) of Agency § 406 comment b (1958). Hence, in the administration of OPM and its functions, the Director is the principal and his subordinates are his agents).

"The right of the principal to control the conduct of the agent with respect to matters entrusted to him is the test of agency." 2A C.J.S. Agency § 6 (1972). The test of the arrangement here in question, then, will be the right of the Deputy Director, in her capacity as Acting Director, to control the conduct of the Executive Assistant to the Director. If that right is unambiguous and assertable, then it cannot be said that the functions delegated to the Executive Assistant to the Director improperly encroach upon the Deputy Director's authority.

Although the power of OPM's agency head to modify or set aside a delegation of authority is undoubtedly an implied term of any such delegation, the Delegation of Authority here at issue expressly contemplated that it might be "specifically revoked by the Director...." See Exhibit 5. The "Director" with power to revoke the delegation must necessarily be the person who, at a given time, is lawfully acting as the Director; it cannot be a reservation of power to the person of the Director alone, particularly at a time when the office of Director is vacant. This is so if only because of the fundamental rule of law that an Executive officer cannot make an irrevocable delegation of governmental power. Certainly the term "Director" necessarily comprehends an "Acting Director" or else, during a vacancy in the office of Director, OPM simply could not act; that is a result that Congress plainly did not intend. Accordingly, it is beyond cavil that, on March 26, 1985, and thereafter, the "Director" was the "Acting Director" and therefore the "Deputy Director;" and thus it is beyond dispute that the Deputy Director was empowered at all times here in question to make, modify, or revoke any delegation of authority to the Executive Assistant to the Director.

But pursuit of this train of logic, though compelling, is, in truth, unnecessary for present purposes, for the true relationship prevailing between the Deputy Director and the Executive Assistant to the Director is precisely spelled out in the latter's position description. There it is unambiguously provided that "[t]he Executive Assistant to the Director reports to the Deputy Director..." and that the Executive Assistant to the Director discharges his responsibilities "[u]nder the direction of the Deputy Director...." See Exhibit 4. The Delegation of Authority cannot be read alone; it must be read along with, and in light of, the Position Description. Both documents were executed on the same day by the same hand, and, in any event, authority cannot be delegated to a position that does not exist. Read together, the Position Description and the Delegation of Authority make it clear that, after March 25, 1985, the Deputy Director was the unquestioned fount of legal authority within OPM and that the Executive Assistant to the Director was, without ambiguity, subject and subordinate to her.

The Line of Succession, plainly showing the Deputy Director ahead of the Executive Assistant to the Director in succession to the powers of the Director, cements this conclusion. (It will be recalled that Mr. Devine issued all three documents — the Position Description, the Delegation of Authority, and the Line of Succession — on the same day. This simultaneity of issuance must be taken into account in construing each of them). All doubt is removed when it is recalled that, as Executive Assistant to the Director, Mr. Devine served as a non-career appointee in the Senior Executive Service; the Deputy Director thus had authority at all times to discharge him essentially at will. See 5 U.S.C. §§ 3132(a)(7) and 7541.

Attempt to Hold-Over

OPM's organic statutes do not provide for the holding-over of a Director whose term of office has expired. Because the same statutes do provide for the holding-over of certain other officers, e.g. members of the Merit Systems Protection Board, at 5 U.S.C. § 1202(c), it must be presumed that Congress did not intend for a Director of OPM to continue in office after the end of his four-year term. At the same time, however, there is nothing in the legislative history of the Civil Service Reform Act (CSRA), Pub. L. No. 95-454 (1978), now codified in Title 5 of the United States Code, to suggest that Congress intended to prohibit an individual from succeeding himself as Director of OPM. In fact, the version of that Act initially passed by the House of Representatives imposed no limiting term of office upon the OPM Director. H.R. 11280, 95th Cong., 2d Sess. § 201(a), as amended and passed, 124 Cong. Rec. 29221 (1978). In contrast, the version of the bill passed by the United States Senate contained more detailed provisions relating to the office of the Director, namely: a four year term of office coterminous with that of the President; removal by the President only for cause; and appointment of a successor to serve an unexpired term of office. S. 2640, 95th Cong., 2d Sess. § 201(a), as amended and passed, 124 Cong. Rec. 27593 (1978). The House proposal would have put the Director's office on precisely the same footing as that of almost every other agency head in the Executive Branch. The Senate passed bill, by contrast, would have made the Director substantially independent of the President, except for appointment.

Essentially the House version was ultimately enacted; all that survived of the Senate bill's provisions was the four-year term. The compromise that was ultimately enacted into law provides that the Director serves for a four-year term, but without limitation on the President's power of removal. S. Conf. Rep. No. 95-1272, 95th Cong., 2d Sess. 10 (1978).

It is noteworthy that neither the final version of the Act passed by the Congress nor any earlier bill passed by either house contained a provision specifically relating to the ability of the incumbent Director to hold-over after his term of office expired. Congress clearly contemplated, therefore, that there would be interim periods between the expiration of one term and the beginning of the next, and the proof will be found in that 5 U.S.C. § 1102(b) operates expressly to cause the Deputy Director to serve as Acting Director until such time as the President nominates, the Senate confirms, and the President appoints a Director for a four year term. The CSRA contains no provision — mandatory or prohibitory —concerning the management structures and processes that the Acting Director may employ during these interim periods. It stands to reason, therefore, that any arrangements for the management of the agency that would otherwise be lawful would be permissible during the periods when OPM is without a Director confirmed in that post by the Senate. This conclusion would hold whether or not a substantial degree of management control over the agency were exercised by the individual whose term as Director had expired or by the Director-Designate, who may indeed be the immediate past Director. While the CSRA prohibits the Director and Deputy Director from serving simultaneously in any other Government position (except as otherwise permitted by statute or directed by the President), 5 U.S.C. § 1102(c), once the Director's term has expired, he is no longer subject to this employment restriction. Furthermore, the legislative history of CSRA contains no indication that such managerial arrangements would in any way be tainted as sub rosa efforts to hold-over after the Director's term of office had expired.

A day after Mr. Devine's term expired he was hired by Acting Director Cornelius as an OPM employee. But there is no basis for concluding that his new position was, in form or in substance, a continuation of his former position.

First, as has been noted, he served in a position subordinate in all respects to the Deputy Director.

Second, his new position was in the Senior Executive Service, with substantially different terms and conditions of employment, including a reduced rate of pay, than those that had appertained to his Directorship.

Third, his non-career appointment in the Senior Executive Service made his tenure dependent upon the satisfaction and will of the Deputy Director.

Fourth, his appointment was not, by its own terms, indefinite in duration, but was a "limited emergency" appointment. See Exhibit 3.

Pursuant to 5 U.S.C. § 3132(a)(6), "limited emergency" appointments in the Senior Executive Service are confined to a maximum of 18 months.

From these facts it is necessarily concluded that the arrangement was markedly different, in terms of power, function, and tenure, from a continuation in the office that he had previously held.

Indeed, considerable evidence exists that his appointment to a subordinate position within OPM was intended less to perpetuate his direct leadership of the agency and more to facilitate the processes of his interaction with Congress in his capacity as Director-Designate, not altogether unlike the arrangements made in times of transition of Presidential administrations. A singularly instructive colloquy transpired, for example, during Mr. Devine's reconfirmation hearing on April 2, 1985:

> Senator Eagleton. I ask this, Mr. Chairman, to be supplied for the record in ten days, I ask Mr. Devine to, and his staff, to take the PTP&C [sic] study [a document relating to the Civil Service Retirement System prepared under contract for OPM]...and to note, in a memo attached to it, the areas in which Mr. Devine disagrees with the TPF&C statement. ***
>
> Mr. Devine. We would be happy to do that, sir.
>
> Senator Eagleton. And get it to us within ten days.***
>
> Mr. Devine. I would much prefer to be able to do it as the Director.
>
> Senator Eagleton. As Director.
>
> (Laughter.)
>
> Senator Stevens. He doesn't have a job right now.
>
> Senator Eagleton. You are emeritus, right?
>
> (Laughter.)
>
> Senator Eagleton. Well, can you do it as a once informed observer who held the job?
>
> Mr. Devine. I certainly can, with hope. We will take a vote on it

> before then so one way or another, I will be happy as the Director of OPM.
>
> Senator Eagleton. Can you do it as Executive Director [sic] to the Acting Director?
>
> Mr. Devine. We will do it in any event.

Stenographic Transcript of Hearing on the Confirmation of Donald J. Devine as Director of the Office of Personnel Management before the Committee on Governmental Affairs of the U.S. Senate 158-161 (unpublished ed.)(April 2, 1985).

Three facts are thus evident: Congress was aware that Mr. Devine remained in the employment of OPM; no representation was made that Mr. Devine occupied anything other than a subordinate position in OPM; and Congress — particularly in the person of the Senator leading the opposition in committee to Mr. Devine's reconfirmation — asked Mr. Devine to use the powers and resources of his official employment to furnish documents and views to that body. None of these facts is consistent with the contention that Mr. Devine "held over" in the Directorship in contravention of the law. To the contrary, they lead to the conclusion that his position, subsequent to March 25, 1985, was distinct from the office of Director and subordinate to the office of Deputy Director.

There is little merit in the related contention that the Delegation of Authority to the Executive Assistant to the Director and the emplacement of that position in the OPM Line of Succession work an impermissible continuation in office. Mr. Devine's authority as Executive Assistant to the Director, unlike that of the Director proper, was subject to change at the instance of the Deputy Director. What is more, his mere presence (along with ten other subordinates of the Deputy Director) in the line of succession and the possibility — the realization of which I have as yet been unable to document — that he acted as Director after March 25th in the absence of the Deputy Director cannot establish a "holding-over." The sense of continuation in office that Congress intended to avoid surely must depend upon both primacy of position and uninterruptedness of power; Mr. Devine emphatically enjoyed neither.

Conclusion

Based upon the foregoing analysis, it is my opinion that the authority delegated to Mr. Devine in his capacity as Executive Assistant to the Director was of a permissible breadth; that Mr. Devine's position did not impermissibly encroach upon the authority of the Deputy Director; and that his appointment to the position was not an impermissible attempt to circumvent the intent of Congress that Directors of OPM not hold-over in office when their four-year terms in office have ended. To the contrary, I conclude that his authority in that position was properly granted in the interests of sound management of OPM and did not exceed the lawful boundaries of authority of subordinate employees of the agency; that his position was unambiguously subject to the superior authority of the Deputy Director both as Acting Director and in her own office; and that Mr. Devine's tenure, as a non-career Senior Executive in a limited emergency appointment not to exceed September 25, 1986, was qualitatively distinguishable in all respects from the office of Director and was in no sense a continuation in that office.

In summary, Mr. Devine's appointment, authority, and tenure as Executive Assistant to the Director of OPM from March 26, 1985, to and including May 3, 1985, was lawful and was properly documented by instruments of lawful form and substance.

cc:
Miss Carol Fox
Counsel
Committee on Governmental Affairs
United States Senate

Mr. James S. Cowen
Special Counsel
Subcommittee on Civil Service,
Post Office, and General Services
Committee on Governmental Affairs
United States Senate

#17

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May 14, 1985

Dr. Donald J. Devine
3311 Camden Street
Wheaton, Maryland 20902

Dear Dr. Devine:

You have asked us to consider whether a certain delegation of administrative authority made by you as Director of the Office of Personnel Management ("OPM") is authorized by law. You have provided us with the following information: On March 25, 1985, you authorized the creation within OPM of the position of Executive Assistant to the Director. You also authorized on that date an amendment to the delegations of authority within OPM listed in OPM's Administrative Manual. This amendment provides in pertinent part that, to the extent "not inconsistent with law" and "unless specifically revoked by the Director . . . [a]ll investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director." (See Exhibit A.) In addition, the Executive Assistant was inserted into the OPM line of succession after the Deputy Director. These steps were taken as a matter of prudent and efficient management, to avoid possible administrative problems that might arise subsequent to March 25, 1985.

Your term of office as Director ended at midnight on March 25, 1985. The following day, Deputy OPM Director Loretta Cornelieus became Acting Director of OPM pursuant to 5 U.S.C. § 1102(b), and appointed you to the position of Executive Assistant to the Director. A comprehensive position description for the Executive Assistant was provided to the Acting Director when she approved the new position. All of these actions were reviewed at the time they were taken, and approved by OPM General Counsel Joseph A. Morris. He has opined in writing that the actions were "plainly of legal form and sufficiency." (See Exhibit B.)

Your appointment was widely covered in the press and was noted during your confirmation hearings on April 2, 1985. During the time you were Executive Assistant, you testified before the Permanent Subcommittee on Investigations of the Senate Government Affairs Committee on April 19, 1985, at the request of that subcommittee. You also testified before the House Post Office and Civil Service Committee on April 2, 1985. The Acting Director had you chair the meetings of OPM's Senior Staff, Senior Policy and Noncareer Policy meetings. At no time during your tenure as Executive Assistant to the Director did the Acting Director modify or revoke the position description or the delegation. You resigned the position of Executive Assistant effective May 3, 1985, and are currently awaiting the Senate's confirmation of your reappointment by President Reagan as OPM Director.

You have asked our opinion as to the validity of your March 25 delegation of the Director's authority to the Executive Assistant to the Director. We believe that the delegation was lawful. Statutory authority for this delegation is provided by the plain language of 5 U.S.C. § 1103(a), the statute that specifies the OPM Director's administrative functions. Section 1103(a) lists eight broad powers as follows:

-- Securing accuracy, uniformity, and justice in the functions of OPM;

-- Appointing individuals to be employed by OPM;

-- Directing and supervising OPM employees, distributing business among OPM employees, and directing the internal management of OPM;

-- Directing the preparation of requests for appropriations for OPM and the use and expenditure of OPM funds;

-- Executing, administering and enforcing the Civil Service laws and "other" activities of OPM including retirement and classification activities;

-- Reviewing civil service life insurance operations;

-- Generally aiding the President in formulating and promoting rules and actions for an efficient Civil Service System; and

-- Conducting studies and research into methods of assuring improvements in government personnel management.

5 U.S.C. § 1103(a) (*See* Exhibit C).

Section 1103(a) further provides that these powers are "vested in" and "shall be performed by the Director, or . . . *by such employees of [OPM] as the Director designates*" subject to Section 1104 of Title 5 (emphasis added). (Section 1104 is not relevant here, for it refers only to delegations of authority to government agencies other than OPM that employ persons in the "competitive" government service.) Section 1103(a) thus clearly authorizes the kind of delegation at issue here.

Although the clarity of the language Congress used in Section 1103(a) to permit delegations of authority eliminates any need to consult that provision's legislative history (*see* *American Tobacco Company* v. *Patterson*, 456 U.S. 63, 68-69 (1982); *see generally* 2A J. Singer, Sutherland Stat. Const. § 46.04 (4th ed. 1984)), that history confirms the conclusion we have reached on the basis of the statute's language. We note, accordingly, that the relevant Senate report states that Section 1103(a) "enumerates functions of the Director," which "are to be performed by the Director *or by his designee* within the Office." S. Rep. No. 969, 95th Cong., 2d Sess. 25 (1978) (emphasis added). (*See* Exhibit D.)

We are further of the opinion that the delegation of authority is not inconsistent with the statutory limitation of four years as the term of the Director of OPM. According to the pertinent legislative history, the sole purpose of the four-year term was to provide the Director with "a measure of independence from the President in performing his duties." *See* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 132 (1978)(conf. report). (*See* Exhibit E.) Congress' limitation on the length of term of office does not in any way evidence an intent on Congress' part to limit the number of terms a person may serve as OPM Director. On the contrary, by not restricting the number of terms that an individua could serve as Director, Congress clearly contemplated that the same person might in fact serve more than once. Inherent in the nomination and confirmation process is the possibility that there will be an interregnum between the expiration of one of a person's terms and the commencement of another. Congress made no affirmative provision for handling any such interregnum, nor did it prohibit any particular arrangements. Accordingly, any arrangements not otherwise inconsistent with law are permissible.

Moreover, the amendment to the OPM Administrative Manual that implemented your delegation of March 25, 1985, explicitly states that this modification of existing OPM delegations of authority is effective only to the extent that it is "not inconsistent with law." (See Exhibit A.) Accordingly, your delegation, by its express terms, cannot exceed that which is permissible under existing law. As has been noted, the delegation could have been (but was not) modified or revoked by the Acting Director at any time during your tenure as Executive Assistant.

Given the explicitness of the statute, the supporting legislative history, and the self-limiting nature of the delegation, we are of the opinion that your March 25 delegation of the OPM Director's authority to the Executive Assistant to the Director is fully authorized by 5 U.S.C. § 1103(a).

COVINGTON & BURLING

By:______________________________

EXHIBIT A

United States Government
MEMORANDUM

Office of Personnel Management

Subject Delegation of Authority

Date MAR 25 1985

In Reply Refer To

From William M. Hunt, Associate Director
for Administration

Your Reference

To Donald J. Devine
Director

This memorandum proposes an amendment to the Administrative Manual, page 12-09, Section 2, Authorities, part 12.202, Delegations. The amendment adds the following new paragraphs at the end of part 12.202, Delegations.

> The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified -- unless specifically revoked by the Director -- when the position of Executive Assistant to the Director is encumbered as follows:
>
> All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion.

I recommend that you approve the proposed amendment.

☑ Approve ☐ Disapprove ☐ Other

Donald J. Devine, Director

3/25/85
Date

EXHIBIT B

nited States Government
MEMORANDUM

Office of
Personnel Management

Date MAY 3, 1985
In Reply Refer To

Delegations of Authority and Line of Succession Instruments Relating to the Executive Assistant to the Director

Joseph A. Morris
General Counsel
Joseph A. Morris

Your Reference

Clifford J. White
Assistant General Counsel
for Administrative Law

Transmitted herewith, for lodging in the OGC Index/Digest office, are copies of the following documents:

(1) The OPM internal delegation of authority, approved on March 25, 1985, by Donald J. Devine, as Director, relating to the Executive Assistant to the Director. You will note that the delegation, on its own terms, reaches only to the extent "not inconsistent with law." You will note further that nothing in it inhibits or frustrates the authority of the Director or Acting Director to modify or revoke the delegation. It is plainly of legal form and sufficiency.

(2) The OPM line of succession, approved on March 25, 1985, by Donald J. Devine, as Director. You will note that the line of succession unambiguously provides that the Director is succeeded by the Deputy Director; the Executive Assistant to the Director follows the Deputy Director in the line of succession and is subordinate to her.

Please touch base with Bill Hunt and make sure that he has copies of these instruments.

These documents are official agency records, are public in nature, and may be produced upon request to any requestor (under the Freedom of Information Act or otherwise).

EXHIBIT C

10. Section 11 is amended

(a) by substituting the word "Authority" for the word "Council" in the first sentence of subsection (a); and

(b) by substituting the word "Authority" for the word "Council" in paragraph (4) of subsection (c).

11. Section 11(d) is revoked.

12. Section 13 is amended

(a) by substituting the word "Authority" for the word "Council" in the third sentence of subsection (b); and

(b) by substituting the word "Authority" for the words "Assistant Secretary" in the first and second sentence of subsection (d).

13. Section 19(d) is amended by substituting the word "Authority" for the words "Assistant Secretary" in the last sentence.

14. Section 21(a) is amended by substituting the words "Office of Personnel Management" for the words "Civil Service Commission" in the second sentence.

15. Section 22 is amended

(a) by substituting the words "Office of Personnel Management" for the words "Civil Service Commission" in the first sentence and

(b) by substituting the words "Merit Systems Protection Board" for the words "Civil Service Commission" in the second and third sentences.

16. Section 25(a) is amended

(a) by substituting the words "Office of Personnel Management" for the words "Civil Service Commission" in the first, second and third sentences; and

(b) by substituting the word "Authority" for the word "Council" in the third sentence.

17. Section 25(b) is amended by substituting the words "Office of Personnel Management" for the words "Department of Labor and Civil Service Commission".

2-4. General Provisions.

2-401. Study and Report Provisions. The Director of the Office of Personnel Management is directed to [illegible] Executive orders [illegible] and [illegible] with such [illegible] as may be [illegible] affected by these orders. The Director of Personnel Management and the Director of the Office of Management and Budget are directed to submit a report on or before July 1, 1980 to the President [illegible] performance [illegible] Executive orders [illegible] Executive orders [illegible] the functions [illegible] Personnel [illegible] specific [illegible] for the [illegible] consolidation, and [illegible] of each Executive order.

2-402. Continuing Effect of this Order. Except as provided by the Civil Service Reform Act of 1978 [amending this title generally] as its provisions become effective in accord with Section 7135 of Title 5, United States Code, as amended [section 7135 of this title] and in accord with Section 904 of that Act [set out as a note under this section], the provisions of this Order shall

continue in effect, according to its terms, until modified, terminated or suspended.

2-403. Transfers and Determinations.

(a) The records, property, personnel and positions, and unexpended balances of appropriations or funds related to Civil Service Commission functions reassigned by this Order that are available or to be made available, and necessary to finance or discharge the reassigned functions are transferred to the Director of the Office of Personnel Management, the Federal Labor Relations Authority, or the Federal Service Impasses Panel, as appropriate.

(b) The Director of the Office of Management and Budget shall make such determinations, issue such Orders, and take all actions necessary or appropriate to effectuate the transfers or reassignments provided by this Order, including the transfer of funds, records, property, and personnel.

2-404. Effective Date. Except as otherwise specifically provided in this Order, this Order shall be effective on January 1, 1979.

JIMMY CARTER

EXECUTIVE ORDER NO. 12157

Ex.Ord. No. 12157, Sept. 14, 1979, 44 F.R. 54035, formerly set out as a note under this section, which related to the President's Management Improvement Council, was revoked by Ex. Ord. No. 12258, Dec. 31, 1980, 46 F.R. 1251, set out as a note under section 14 of Appendix 1 of this title.

Notes of Decisions

Savings clause 7

---

7. Savings clause

Merit Systems Protection Board properly construed savings clause, [set out as a note under this section] which makes section 7703 of this title inapplicable to cases instituted before its effective date, as meaning that agency proceeding exists once employee has received notice of proposed action, and thus instant personnel actions, involving employees who had received notice of proposed personnel action before, but who had their cases decided adversely by Board after Act became effective, had to be reviewed under prior law, which did not permit review in Court of Appeals. Kyle v. I.C.C., 1979, 609 F.2d 540, 197 U.S.App.D.C. 285.

Merit Systems Protection Board's interpretation of savings clause, [set out as a note under this section] which makes section 7703 of this title inapplicable to cases instituted before its effective date, that agency proceeding exists once employee has received notice of proposed action should be respected in accordance with judicial deference usually accorded to interpretation made by agency charged with a statute's administration. Id.

§ 1102. Director; Deputy Director; Associate Directors

(a) There is at the head of the Office of Personnel Management a Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The term of office of any individual appointed as Director shall be 4 years.

(b) There is in the Office a Deputy Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or when the office of Director is vacant.

(c) No individual shall, while serving as Director or Deputy Director, serve in any other office or position in the Government of the United States except as otherwise provided by law or at the direction of the President. The Director and Deputy Director shall not recommend any individual for appointment to any position (other than Deputy Director of the Office) which requires the advice and consent of the Senate.

(d) There may be within the Office of Personnel Management not more than 5 Associate Directors, as determined from time to time by the Director. Each Associate Director shall be appointed by the Director.

(As amended Pub.L. 95-454, Title II, § 201(a), Oct. 13, 1978, 92 Stat. 1119.)

1978 Amendment. Pub.L. 95-454 substituted in the section catchline "Director; Deputy Director; Associate Directors" for "Term of office; filling vacancies; removal" and substituted provisions relating to the Director, Deputy Director, and Associate Directors of the Office of Personnel Management for provisions relating to the term of office, vacancies, and removal of members of the United States Civil Service Commission.

Effective Date of 1978 Amendment. Amendment by Pub.L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub.L. 95-454, set out as a note under section 1101 of this title.

EXHIBIT D

CIVIL SERVICE REFORM ACT OF 1978

P.L. 95–454

CIVIL SERVICE REFORM ACT OF 1978

P.L. 95-454, see page 91 Stat. 1111

Senate Report (Governmental Affairs Committee) No. 95-969, July 10, 1978 [To accompany S. 2640]

House Report (Post Office and Civil Service Committee) No. 95-1403, July 31, 1978 [To accompany H.R. 11280]

House Conference Report No. 95-1717, Oct. 5, 1978 [To accompany S. 2640]

Senate Conference Report No. 95-1272, Oct. 4, 1978 [To accompany S. 2640]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate August 24, October 4, 1978

House September 13, October 6, 1978

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) and the House Conference Report (p. 2860) are set out.

SENATE REPORT NO. 95-969

[page III]

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[page 1]

The Committee on Governmental Affairs, to which was referred the bill (S. 2640) to reform the civil service laws, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. BACKGROUND

The changes in law which are proposed in S. 2640 will constitute the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883. Since that time total civilian employment

SECTION 201

This section strikes the existing language of Chapter 11, Title V, United States Code (pertaining to establishment and structure of the Civil Service Commission), and substitutes a new Chapter 11 setting forth the organization, structure, and functions of the Office of Personnel Management. Chapter 11 is subdivided as follows: Section 1101—Office of Personnel Management; Section 1102—Director; Deputy Director; Associate Directors; Section 1103—Functions of the Director; Section 1104—Delegation of Authority for Personnel Management.

Section 1101. Office of Personnel Management

This section provides that the Office of Personnel Management is to be an independent establishment in the Executive branch. It provides for an official seal for the office which is to be judicially noticed. The principal office of the Office of Personnel Management is to be in the District of Columbia, but it may have field offices in other locations.

Section 1102. Director; Deputy Director; Associate Directors

Subsection (a) provides that there is to be a Director at the head of the Office of Personnel Management, appointed by the President and confirmed by the Senate. The Director is to have a term of four years, coterminous with the term of the President, and is to be subject to removal by the President only for cause.

Subsection (b) provides for a Deputy Director for the Office of Personnel Management, appointed by the President and confirmed by the Senate. The Deputy Director is authorized to perform such functions as the Director determines, and is authorized to act for the Director during his absence or disability or in the event of a vacancy in the Director's position.

Subsection (c) provides that neither the Director nor the Deputy Director may serve in any other position in the government of the United States during their incumbency, except as provided by law or by the President. In order to insure that they administer the Civil Service system in as fair and as evenhanded a manner as possible, and not become involved in recommending particular individuals for particular appointments in Executive branch agencies. the Committee added a provision prohibiting the Director or Deputy Director from advising the President, directly or indirectly on any specific political appointment. This proviso is not intended to prohibit the Director from consulting with the President about the selection of an individual to serve as Deputy Director of OPM.

Subsection (d) provides for the Director to appoint up to five Associate Directors. The Associate Directors are to be in the Senior Executive Service.

Section 1103. Functions of the Director

Subsection (a) enumerates functions of the Director. The functions are to be performed by the Director or by his designees within the Office. They are: (1) assisting the President in preparing civil

EXHIBIT E

95th Congress } HOUSE OF REPRESENTATIVES { Report
2d Session } { No. 95-1717

CIVIL SERVICE REFORM ACT OF 1978

October 5, 1978.—Ordered to be printed

Mr. Udall, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2640]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2640) to reform the civil service laws, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SHORT TITLE

Section 1. This Act may be cited as the "Civil Service Reform Act of 1978".

TABLE OF CONTENTS

Sec. 2. The table of contents is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. Findings and statement of purpose.

TITLE I—MERIT SYSTEM PRINCIPLES

Sec. 101. Merit system principles; prohibited personnel practices.

TITLE II—CIVIL SERVICE FUNCTIONS; PERFORMANCE APPRAISAL; ADVERSE ACTIONS

Sec. 201. Office of Personnel Management.
Sec. 202. Merit Systems Protection Board and Special Counsel.
Sec. 203. Performance appraisals.
Sec. 204. Adverse actions.
Sec. 205. Appeals.
Sec. 206. Technical and conforming amendments.

or the taking of any personnel action against an employee who discloses information to Congress.”

The House amendment has no comparable provision.

The conference substitute in 2302 adopts the Senate provision. The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.

TITLE II

Term of the Director of the Office of Personnel Management

The Senate bill provides that the Director of the Office shall have a 4-year term coterminous with that of the President, and that the Director may be removed only for inefficiency, neglect of duty, or malfeasance in office.

The conference substitute deletes the limitation on the President's removal power contained in the Senate bill, making the Director removable at the will of the President. In order to provide the Director with a measure of independence from the President in performing his duties, though, the conference substitute provides that the Director have a 4-year term, and deletes the Senate requirement that the term be coterminous with that of the President.

Senate Confirmation of Chairman of the MSPB

The Senate bill requires confirmation of the Chairman of the Merit Systems Protection Board as chairman of the Board. The House amendment has no comparable provision.

The conference substitute in section 1203 adopts the Senate provision. This would mean that a sitting member of the Board who is nominated for the chairmanship must be confirmed by the Senate for that position. If the President appoints a person who is not serving on the Board to the chairmanship, that person could be confirmed simultaneously as both Chairman and a member of the Board.

STAYS OF AGENCY PERSONNEL ACTIONS

The Senate bill specifies procedures for the MSPB to issue temporary and permanent stays of agency personnel actions involving Hatch Act reprisals, reprisals against whistleblowers, or reprisals for the exercise of appeal rights. It authorizes the Special Counsel to peti-

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

#18

May 22, 1985

To: Senator Thomas F. Eagleton
Attention: Peggy Crenshaw

From: American Law Division

Subject: Delegation of Authority to Former Director of Office of Personnel Management

This memorandum briefly discusses legal questions raised by personnel actions taken during the final day of the tenure of the former Director of the Office of Personnel Management, Donald Devine. The purpose of the discussion is to highlight questions rather than offer extended analysis of the legal ramifications of all the actions taken, a task that would not be possible given the lack of documentation ~~available~~ and the time frame of this response.

On March 25, 1985 — the last day of Devine's four-year term as OPM Director — a new position, Executive Assistant to the Director, was created and certain delegations of authority were made to it. A March 25 memorandum addressed to Devine from William Hunt, Associate Director for Administration, described the delegations:

> The delegations of authority set forth in the Administrative Manual (AM) and AM Supplement 12-2, Authorities and Delegations Manual, not inconsistent with law, are modified -- unless specifically revoked by the Director — when the position of Executive Assistant to the Director is encumbered as follows:
>
> All investments and delegations of authority to the Director are delegated to the Executive Assistant to the Director who may, in turn, redelegate authority at his discretion.

The Executive Assistant to the Director was also placed behind the Deputy Director in the agency's line of succession.

The following position description for Executive Assistant to the Director was approved by Devine, also on March 25:

> The Executive Assistant to the Director reports to the Deputy Director and is responsible for directing and coordinating the Office of Personnel Management's (OPM) work force.
>
> Under the direction of the Deputy Director, is responsible for the general administrative management and the general direction and planning activities of OPM.
>
> Is responsible for carrying out the following duties:
>
> 1. Directs the planning and development of an effective Government-wide personnel program for the purpose of providing the Federal Government with an effective and efficient career work force.
>
> 2. Directs OPM's activities in operating an effective Government-wide personnel program and in carrying out the other operating functions for which OPM is responsible.
>
> 3. Directs the administrative management of the activities and functions of OPM.

Finally, the Deputy Director approved the movement of Devine from Director to Executive Assistant to the Director, to be effective on March 26. The tenure of the new position was to expire not later than September 25, 1986. Devine resigned from this position effective May 3, 1985. In the interim, he apparently signed off on official agency matters and performed the delegated duties of Executive Assistant to the Director.

I

The governing statute provides that the Deputy Director of OPM "shall act as Director during the absence or disability of the Director or when the office of Director is vacant." 5 U.S.C. 1102(b). The Deputy Director is appointed by the President with the advice and consent of the Senate. Id. Thus, as of March 26, when former Director Devine's term ended, the Deputy Director was to act as Director during the vacancy caused by the completion of the Director's term. The statute does not provide for a holdover period for officers whose terms have ended.

Controversy centers on the scope of the delegation of authority to the newly-created Executive Assistant to the Director and alleged usurpation of the Deputy Director's functions as acting Director by Devine in his role as Executive Assistant to the Director. We have no details as to the precise nature of any alleged usurpation of authority. The General Counsel of OPM, in a May 3 memorandum, noted that the March 25 delegation of authority to the Executive Assistant "on its own terms, reaches only to the extent not inconsistent with law'," and that "nothing in it inhibits or frustrates the authority of the Director or Acting Director to modify or revoke the delegation."

While not entirely clear, the delegation appears to purport to delegate the functions of the Director, as described in the agency's Administrative Manual, to the Executive Assistant to the Director when that position is filled. The proviso "not inconsistent with law" appears to modify the delegations set forth in the Manual that are being delegated to the Executive Assistant. The delegation is subject to revocation by the Director and, presumably, the Deputy Director when acting as Director pursuant to 5 U.S.C. 1102(b). The May 3 General Counsel's memorandum appears to interpret the proviso as modifying the act of delegating the Director's functions to the Executive Assistant. In its opinion, that fact, combined with the Acting Director's ability to modify or revoke the delegation to the Executive Assistant, saves the action from legal challenge.

The delegation to and performance of all of the Director's functions by the Executive Assistant (if that was intended) may be seen as violative of the spirit if not the letter of the vacancy provisions applicable to OPM. The statute provides that the Deputy Director -- a presidentially appointed and senatorially confirmed officer -- shall act as Director when the office of Director is vacant. To vest the Director's functions in a Senior Executive Service employee such as the Executive Assistant arguably frustrates the clear design of the statute, namely, that the officer acting as Director be one that is accountable to the President and the Senate for his or her appointment. The naming of Devine to the Executive Assistant position and the continued performance by him of the Director's authority can also be viewed as violative of the intent of the vacancy provision -- that the Director's term is to end after four years and be subject to renomination and reconfirmation and that in the interim the former Director is not to hold over but is to be replaced by the Deputy Director.

The position description of the Executive Assistant to the Director states that he "reports to the Deputy Director" and carries out his responsibilities "[u]nder the direction of the Deputy Director." He is also placed behind the Deputy Director in the line of succession. Nevertheless, the wording of the delegation of authority to the Executive Assistant, the timing of the creation of the position, and reports that, in fact, the Executive Assistant was running the agency, raise questions as to whether Congress' intent in the vacancy provision governing the Director of OPM was frustrated. The lack of a clear picture as to what exactly transpired and the General Counsel's characterization of what occurred make a conclusive legal judgment impossible.

II

The creation of the Executive Assistant to the Director position may also raise questions. The position, according to OPM documentation, is an SES limited emergency position. The request for the position stated that it is "needed to provide top level assistance in managing the agency and assure the implementing of the Administration's personnel goals and initiatives." The request for the position, directed to the Assistant Director for Executive Administration from the Chair of the Executive Resources Board, was made on March 25, 1985. A "limited emergency appointee" is defined by law as "an individual appointed under a nonrenewable appointment, not to exceed 18 months, to a Senior Executive Service position established to meet a bona fide, unanticipated, urgent need." 5 U.S.C. 3132(a)(6). Furthermore, the law requires that each such appointee "shall meet the qualifications of the position to which appointed, as determined in writing by the appointing authority." 5 U.S.C. 3394(a).

With respect to the latter requirement, we are not aware that the Deputy Director, when appointing Devine as Executive Assistant, made a written determination as to his qualifications. While it may be difficult to argue that he lacked the qualifications to perform the tasks outlined in the position description, the statute -- in recognition of the urgency and limited nature of such appointments — requires formal determination by the appointing authority of qualification.

The stated rationale for creating the Executive Assistant position also would arguably seem to fall short of the statutorily required prerequisites for such limited emergency appointments. The March 25 request, quoted above, is not phrased in terms evincing an "unanticipated, urgent need", as required by 5 U.S.C. 3132(a)(6). Providing for a smooth transition pending reconfirmation of the former Director might qualify as a bona fide, urgent need; such a reason, however, was not offered for creation of the position. Whether the position is refilled after Devine's May 3 resignation, may indicate whether an urgent need is present pending confirmation of a new Director. Creating a new high-level position, formally amending the agency's Administrative Manual, and changing the line of succession also would seem more appropriate to a permanent position rather than a limited, emergency position.

III

Assuming illegality in the creation of the Executive Assistant position and Devine's performance of the functions of that office, the question remains of the vulnerability to legal challenge of actions taken during the period in question. There is authority — the so-called "de facto officer" doctrine -- that prohibits or severely limits the ability to attack government actions on the ground that the officials taking the actions invalidly hold office. Such collateral attacks are seen as posing "too great a threat that the attacked officials' past actions would be subject to wholesale invalidation, which would interfere with the government's ability to take effective action and with third parties' reliance on apparently final government actions." *Andrade* v. *Lauer*, 729 F. 2d 1475, 1496 (D.C. Cir. 1984). See, *E.E.O.C.* v. *Sears, Roebuck & Co.*, 650 F. 2d 14 (2d Cir. 1981) (E.E.O.C. charge upheld despite fact that it was verified by a Commissioner whose right to continuance in office after expiration of his statutory term was questioned); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (actions of Federal Elections Commission validated despite its unconstitutional composition); see generally, 67 C.J. S. *Officers*, Sec. 264-276.

The court in *Andrade* v. *Lauer*, *supra*, however, recognized exceptions to the bar of the de facto officer doctrine. It declined to dismiss claims of persons challenging their RIFs by an agency official who allegedly held office illegally. The illegality claimed was that the officer who had taken the action was not entitled to serve as acting administrator of the agency pursuant to a statutory vacancy provision. See, 729 F. 2d at 1500-1. The court held that the purposes of the de facto officer doctrine are satisfied and plaintiffs may bring suit if two requirements are met: (1) the action must be brought "at or around the time the challenged government action is taken" and (2) it must be shown that the agency involved has had "reasonable notice under all the circumstances of the claimed defect in the official's title to office." 729 F. 2d at 1499. The court remanded the case for further factual development.

Thus, it would seem possible that legal challenge could be brought based on actions taken during the period Devine held office as Executive Assistant to the Director. Individuals subjected to adverse personnel actions under his direction may be those most likely to be able to overcome the de facto officer doctrine. Of course, the lack of documentation as to the operation of the office of Executive Assistant and the specific actions taken during the period, make impossible a judgment regarding the possibility of successful legal challenge at this time.

Richard Ehlke
Specialist in American
Public Law
American Law Division
May 22, 1985

BY THE US GENERAL ACCOUNTING OFFICE

Report To The Director, Office Of Personnel Management

New Performance Appraisals Beneficial But Refinements Needed

Performance appraisal systems established by the Civil Service Reform Act of 1978 provided for the development of objective criteria for formally rating the performance of Federal employees. Ninety-five percent of all General Schedule employees covered under the act had been provided performance standards by October 1, 1981--the implementation date.

Major benefits of the new appraisal system have been improved communication and understanding of work requirements between employees and supervisors. However, many agencies need to further refine their systems to improve the quality of performance standards, the timeliness and manner of completing appraisals, and the use of appraisal results in making personnel decisions.

GAO recommends several ways in which the Office of Personnel Management could help agencies improve their performance appraisal systems.

GAO/GGD-83-72
SEPTEMBER 15, 1983

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-209522

The Honorable Donald J. Devine
Director, Office of Personnel
  Management

Dear Dr. Devine:

This report summarizes the results of our review of agencies' implementation of performance appraisal systems for General Schedule employees. Although agencies did well to provide standards to virtually all employees and communication on performance standards increased, many agencies need further refinements to their appraisal systems.

This report contains recommendations to you on pages 30 and 31. As you know, 31 U.S.C. §720 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to the Director, Office of Management and Budget and to other interested parties.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

REPORT TO THE DIRECTOR,
OFFICE OF PERSONNEL
MANAGEMENT

NEW PERFORMANCE APPRAISALS BENEFICIAL BUT REFINEMENTS NEEDED

DIGEST

The Civil Service Reform Act of 1978 directed Federal agencies to develop, to the maximum extent feasible, objective criteria for formally rating the performance of their employees. Supervisors are to use performance appraisals to recommend appropriate personnel actions, including rewards, promotions, and removals. The act gave agencies considerable latitude to design appraisal systems to meet their own needs.

The act requires GAO to review, on a selected basis, performance appraisal systems established under the act. GAO looked at how well nine agencies had implemented their performance appraisal systems for General Schedule employees. The systems' design and implementation was time consuming, and all agencies did well to provide performance plans and standards to 95 percent of their employees by the October 1, 1981, implementation date.

So far, the major benefit appears to be better communication between employees and supervisors. Employees who helped prepare their performance standards have gained a better understanding of their responsibilities and of their supervisors' expectations. Supervisors, in turn, have had to define job requirements more clearly and explicitly.

Still, many important aspects of the performance appraisal systems need major improvements, and a substantial amount of time and additional effort are required if performance appraisal systems are to become a credible basis for personnel actions. The following are among the areas requiring attention by the agencies and the Office of Personnel Management (OPM).

ISSUES IDENTIFIED IN THE STANDARD-SETTING PROCESS

GAO did an extensive analysis of the standard-setting process at three agencies which showed that:

--Many employees did not actively participate in setting their performance standards.

--Not all employees were advised of the standards by which their performance would be appraised at the beginning of appraisal periods.

--Performance standards often (1) were not clearly stated in measurable terms, (2) did not differentiate between performance levels, (3) failed to clearly identify unacceptable performance levels, (4) did not allow for the satisfactory level to be exceeded, and (5) were not improved or clarified in subsequent appraisal periods.

ISSUES IDENTIFIED IN THE WAY APPRAISALS ARE COMPLETED AND USED

--Some appraisals were not completed until long after the end of the appraisal period.

--Some agencies' procedures for determining an overall summary rating from ratings on individual elements and standards were unnecessarily complicated or ambiguous.

--Higher level officials' review of ratings, designed to help ensure that performance was objectively appraised, were often merely perfunctory.

--The agencies' procedures for linking performance appraisal results to personnel decisions were often vague, and employees did not perceive a direct relationship between appraisals and personnel decisions.

Section 4303 of title 5 was designed to make it easier for agencies to support performance-related adverse actions such as removals or reductions in grade. However, many agency officials do not believe the act has improved their ability to take such actions, and that section does not address denials of within-grade increases.

Evaluations of performance appraisal systems, by agencies or OPM, to identify problems and make improvements have been limited.

Similarly, more could be done to assess employee attitudes about performance appraisal and to identify ways to increase their confidence in the systems.

The results of GAO's work were discussed with responsible officials for all nine agencies reviewed, and they all concurred with GAO's analysis.

The development of performance appraisal systems that can reliably serve as a basis for making personnel decisions can take several years, even with extensive monitoring and evaluation. OPM needs to ensure that agencies take appropriate actions to make needed refinements to their appraisal systems.

CONCLUSIONS AND RECOMMENDATIONS

GAO cannot project that all the problems identified at the nine agencies reviewed apply to all Federal agencies. Problems with standard-setting, however, were prevalent in all three agencies where we did a 2-year analysis. Also, each of the nine agencies reviewed had some problems with the way appraisals were completed or used.

Many of the agencies' problems occurred in areas already covered to some degree by law, Federal regulations (5 CFR 430), or OPM guidance. Many of the provisions in the law and regulations are not specific and the differences in agencies' approved systems reflect this. OPM guidance is more specific and agencies were either not following or not fully complying with these provisions. Therefore, GAO believes the Director, OPM, should, pursuant to his responsibilities in the Civil Service Reform Act (5 U.S.C. 4304), direct agencies to take appropriate action that will result in:

--Establishing performance standards that, to the maximum extent feasible, contain quantity, quality, and timeliness measures and that clearly distinguish between performance levels.

--Requiring, rather than encouraging, employees to participate in the development of standards and receive them at the beginning of each appraisal period.

--Requiring that appraisals be completed, reviewed, and communicated to employees within a specified time after the end of appraisal periods, and that procedures for deriving summary ratings are more clear.

--Requiring some type of interim feedback be given to employees at least once during the appraisal period.

--Providing guidance on the establishment of clear and specific linkages between appraisal results and personnel decisions.

--Improving the evaluation of performance appraisal systems.

GAO recommends that the Director, OPM:

--Require a second level review of employees' performance standards at the beginning of appraisal periods to ensure that those standards contain, to the maximum extent feasible, the desired characteristics of objectivity and measurability.

--Research the potential value of generic standards for large occupational groups that agencies could use as a basis for developing specific standards for employees in those occupations.

--Develop and propose an amendment to the Civil Service Reform Act clearly stating that denying a within-grade increase is a performance-related action covered under section 4303.

AGENCY COMMENTS

OPM generally concurred with GAO's conclusions and recommendations. OPM agreed with GAO's recommendation that a second level review of employees' standards at the beginning of appraisal periods was necessary to ensure that standards are as objective and measurable as possible. OPM had included such a provision in a comprehensive set of regulations it proposed in July 1983 dealing with performance appraisal, merit pay, awards, and a Performance Based Incentive System. OPM also agreed that providing generic standards for large occupational groups to agencies for use in developing more specific standards for employees in these occupations may be useful and will continue its research concerning this matter. OPM agreed in substance with GAO's recommendation that a within-grade increase be classified a performance-related action covered under section 4303 so that denying it requires only substantial evidence to support. OPM indicated that the Court of Appeals for the Federal Circuit will uphold decisions based on substantial evidence, despite the Third Circuit's decisions requiring the greater preponderance of evidence. However, OPM said that it is considering statutory changes which would have the effect of GAO's recommendation. OPM's specific comments are included in chapter 4 (see pp. 31 to 33).

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ABBREVIATIONS

DOI	Department of the Interior
FTC	Federal Trade Commission
GAO	General Accounting Office
HUD	(Department of) Housing and Urban Development
IAG	Interagency Advisory Group
ICC	Interstate Commerce Commission
MSPB	Merit Systems Protection Board
NPS	National Park Service
OPM	Office of Personnel Management
OS/IG	Office of the Secretary/Office of the Inspector General
SES	Senior Executive Service
VA	Veterans Administration

CHAPTER 1

INTRODUCTION

The Civil Service Reform Act of 1978 requires GAO to review on a selected basis performance appraisal systems established under the act (5 U.S.C. 4304). In response to this mandate, we reviewed nine Federal agencies' implementation of their performance appraisal systems for those employees not covered by the Senior Executive Service (SES) system or the merit pay system. Separate GAO reviews of performance appraisal systems for SES and merit pay employees are currently under way.

OBJECTIVES OF THE ACT

A key objective of the Reform Act was to have agencies develop effective performance appraisal systems which could be reliably used as a basis for personnel decisions. The act gave agencies considerable latitude in designing systems to meet their own needs, requiring only that the systems:

--Provide for periodic appraisals of job performance of employees.

--Encourage employee participation in establishing performance standards.

--Use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

The act directed OPM to develop implementing regulations to provide for:

--Establishing performance standards that, to the maximum extent feasible, permit evaluation on the basis of objective criteria.

--Evaluating each employee according to the standards at least once during the appraisal period.

--Recognizing and rewarding employees whose performance so warrants.

--Assisting employees in improving unacceptable performance.

--Reassigning, reducing in grade, or removing employees who continue to have unacceptable performance.

The act also directed that OPM offer technical assistance to agencies developing performance appraisal systems, review the developed systems, and determine whether the systems meet statutory requirements. Where statutory requirements were not met, OPM was to direct the agency to implement an appropriate system or to correct operations, and the agency was to comply with such directives.

Ninety-four of the 95 Federal agencies subject to these provisions of the act had OPM-approved performance appraisal systems by October 1, 1981, as required. The Merit Systems Protection Board (MSPB) had not submitted its plan by that date. Nearly two million non-SES, non-merit pay employees were included under the performance appraisal systems of these 95 agencies. [1]

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objective was to evaluate how well agencies had implemented their performance appraisal systems required by the act. Specifically, we reviewed:

--Each agency's compliance with the law and regulations in setting performance standards for their non-SES, non-merit pay employees.

--Each agency's ability to base its employee appraisals on those standards and use the results for making personnel decisions.

--OPM's role in prescribing regulations, providing technical assistance, and reviewing and approving each agency's system.

We reviewed OPM's performance appraisal guidelines and regulations, nine agencies' performance appraisal system plans and operating procedures, and employee grievances related to performance appraisal. Using a structured interview format, we interviewed officials who were responsible for implementing non-SES, non-merit pay appraisal systems and who could explain how their systems were to operate at the nine Federal agencies. We reviewed the systems at the Department of Housing and Urban Development (HUD), the Department of the Interior (DOI), the Federal Trade Commission (FTC), the Interstate Commerce Commission (ICC), and the National Credit Union Administration (NCUA) to provide a mix of large and small organizations that had completed at least one appraisal period under the new requirements. For agencies involved in their first appraisal period under the new requirements, we reviewed the Departments of Treasury, Transportation, and Air Force and the Veterans' Administration. These agencies were selected through consultation with OPM, and to ensure that we examined both civilian and defense agencies.

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[1] All but the following Federal employees are covered under performance appraisal systems in 5 USC 4302: employees in the Foreign Service; members of medical professions in the Veterans Administration; administrative law judges; individuals in the Senior Executive Service; individuals appointed by the President; other individuals specifically excluded by OPM; and individuals working in certain excluded agencies.

To assess employee attitudes toward the new systems and gain a better understanding of how the systems were implemented, we interviewed employees at three of the nine agencies. We chose three agencies for employee interviews--HUD, FTC, and DOI--because of their different organizational structures. HUD was chosen because it is a large agency that has one system for all covered employees; FTC is a small agency with one system; and DOI is a large agency with several separate systems for its organizational components. We included headquarters employees at all three agencies and employees in the agencies' larger offices. At HUD, we included employees in Boston and San Francisco; at FTC, Atlanta and San Francisco; and at DOI, Sacramento, Boston, and San Francisco. To compare implementation between components of an agency with several systems, we selected two subagencies of DOI: the Office of the Inspector General in the Office of the Secretary (OS/IG) and the National Park Service (NPS). We interviewed five employees from each of the largest professional and clerical series at each agency and location, their supervisors, and their reviewing officials. This procedure resulted in interviews with a total of 55 rated employees, 47 supervisors, and 29 reviewing officials. The number of supervisors interviewed was less than 55 because some supervisors were responsible for more than one of the employees interviewed. The number of reviewing officials was less than 55 for the same reason, and nine employees we interviewed had no reviewing official. The results of these interviews were used to help us identify some of the successes and types of problems experienced by some Federal workers, not to show the incidence with which each existed.

To assess the extent to which performance standards met statutory and regulatory requirements, we analyzed the standards established for the employees selected for interviews. For this assessment of standards, we used content analysis, a procedure for collecting and organizing information in a standardized format that allows analysts to make inferences about the characteristics and meaning of the collected material. The objectives of our content analysis were to (1) assess the quality of performance standards in place at selected agencies during two appraisal periods and (2) determine whether the agencies had improved the quality of their standards in the later appraisal period. In addition, we randomly selected and analyzed a number of VA employees' standards for a 1-year period because standards for VA employees appeared clearer and more measurable than others in our review. (See app. I.)

As with the interviews, the results of these analyses are not necessarily representative of all Federal agencies. Again, they simply indicate some of the successes and some of the problems with performance standards.

The results of our work were discussed with responsible agency officials from all nine agencies who concurred with our analysis.

Our review took place during the period between March and August 1982 and was carried out in accordance with generally accepted government auditing standards.

CHAPTER 2

STANDARD SETTING: AN IMPROVED PROCESS NEEDING FURTHER REFINEMENTS

The standard-setting process is an essential component of the new performance appraisal systems. The act required agencies to encourage employee participation in setting standards and to communicate standards to employees at the beginning of each appraisal period. In addition, agencies must see that standards are established which permit supervisors to accurately evaluate performance on the basis of objective criteria.

According to an OPM report, 95 percent of all employees covered under the act had standards in place by October 1, 1981, as required, a major accomplishment requiring considerable time and effort. At eight of the nine agencies we reviewed, management officials reported that although supervisors devoted little or no time to setting standards under previous performance appraisal systems, now supervisors are devoting up to 80 hours a year to establish appropriate standards for their employees.

Many employees and supervisors, as well as reviewing and management officials, cited better communication as a major result of the standard-setting process. They felt that, in general, when supervisors and employees jointly discussed and established standards for performance, both groups better understood the others' responsibilities and expectations.

Our analysis, however, also showed that many standards did not contain measurable factors, did not differentiate between performance levels, and failed to clearly define unacceptable performance.

CONTINUED EMPHASIS ON EMPLOYEE PARTICIPATION AND TIMELY COMMUNICATION OF STANDARDS IS NEEDED

Improved communication of work requirements is one of the objectives of the act. Management officials, supervisors, and employees said that staff better understand their responsibilities as a result of the standard-setting process under the new provisions of the act.

According to agency officials we interviewed, communication on performance standards between supervisors and employees improved at eight of nine agencies. One agency, FTC, used model standards for all employees, and agency officials saw no real improved communication. Also, we identified instances at HUD and DOI where employee participation was limited and standards were not always communicated to employees at the beginning of the appraisal period as required. In addition, the degree to which agencies encouraged employee participation and the degree of timeliness with which standards were communicated declined in the subsequent appraisal period at the agencies we reviewed.

Agencies need to continue emphasis on employee participation

According to OPM, involving employees in planning work, setting standards, and appraising performance promotes more objective appraisals and results in improved performance and motivation. The agencies' performance appraisal systems we reviewed provided for employee participation in the standard-setting process as required by the act. The level and type of employee participation varied considerably among agencies and, in some cases, among individual supervisors. Although agency officials in eight of the nine agencies stated that employees were involved in drafting performance standards, supervisors from six of these eight agencies said that employees only reviewed proposed standards.

According to HUD and NPS policy, supervisors and employees were to work together to develop standards. The amount of employee involvement varied considerably depending on the supervisor. Eleven employees of the 30 we interviewed at HUD and NPS (2 at HUD and 9 at NPS), said they participated actively in the standard-setting process, while 18 (13 at HUD and 5 at NPS) said they did not participate in the process at all or only provided comments on proposed model standards for their occupation. (One NPS employee gave no response to this question.)

At FTC, headquarters personnel officials developed model standards for all occupational categories and grade levels. FTC officials solicited comments from employees, but only one employee from the San Francisco Regional Office and one from the Atlanta Regional Office submitted comments. At both these regions we found that FTC supervisors adopted the model standards without revision for all covered employees.

At DOI's OS/IG, we found that some employees had more input than others in the standard-setting process. For example, clerical staff helped draft their individual standards, while management officials, in consultation with a representative committee of auditors, established uniform standards for all auditors.

There were indications that employee involvement declined after the first appraisal period. According to 102 supervisors and employees from HUD, FTC, DOI's OS/IG and NPS, more said their agencies had encouraged participation in the first period than in the later appraisal period.

Agencies need to continue emphasis on timely communication of standards

The act requires that employees receive their performance standards at the beginning of the appraisal period. OPM guidance advises agencies that effective two-way communication about a job's standards at the beginning of the appraisal period provides both parties with an opportunity to identify and resolve any misunderstandings. Early discussion of standards also reduces the likelihood of disagreements when the appraisal is made.

We found that agencies did communicate standards to employees at the beginning of the first period in most cases. However, an increased number of employees claimed they did not receive their standards at the beginning of the second period that we reviewed.

We interviewed employees at three agencies [1] about the timeliness with which their standards were communicated to them. Of the 53 employees responding to the question for the first period, only 10 (19 percent) said they did not receive their standards at the beginning of the period. However, of 33 employees responding to the question for the later period, 14 (42 percent) said they did not receive their standards at the beginning of the period. Five FTC employees had not received their performance standards at least 7 months into the second appraisal period.

Untimely communication of performance standards to employees could prevent an agency from successfully sustaining a corrective action against a poor performer. In one case involving an agency's decision to remove an employee because of unacceptable performance, the MSPB found that the agency violated regulations by not notifying the employee of his critical elements and performance standards at the beginning of the appraisal period, and MSPB reversed the agency's action.

THE QUALITY OF STANDARDS NEEDS IMPROVEMENT

The act requires that, to the maximum extent feasible, performance appraisals be based on objective criteria. The appraisal process requires standards that are clearly stated and measurable. In our analysis of the performance standards established at three agencies, we determined that the standards often

--were not clearly stated in measurable terms;

--did not differentiate between performance levels;

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[1] HUD, FTC, and two subagencies of DOI: OS/IG and NPS.

- --failed to clearly identify unacceptable performance levels;
- --did not allow for the satisfactory level to be exceeded; and
- --were not improved or clarified in subsequent appraisal periods.

Although agencies need to improve the quality of their standards, they and OPM have taken only limited action to improve standards.

Agencies need to improve measurability of standards

The Interagency Advisory Group (IAG) Subcommittee on Improving the Quality of Elements and Standards [2] has stated that the success of any performance appraisal system depends largely on the validity and quality of the performance elements and standards. Both OPM and the IAG suggest that performance standards should measure quality, quantity, and timeliness, and if they do not, supervisors may find it difficult to reliably and objectively assess performance and determine an appropriate rating.

Using this OPM criteria in our analysis of performance standards at HUD, FTC, and DOI's OS/IG and NPS, we determined that standards were often vague and not stated in measurable terms. In contrast, the performance standards at VA were generally precise and measurable.

Many of the standards at HUD, FTC, and DOI's OS/IG and NPS did not contain quality, quantity, and timeliness measures. The percentages of standards analyzed that contained one or none of the required measures were: HUD, 56 percent; FTC, 79 percent; DOI's OS/IG, 62 percent; and NPS, 53 percent. VA's standards, on the other hand, always contained two or more of these measures.

For example, one critical element for an FTC clerk-typist is preparation of written material, letters, and memoranda. Recognizing that it is difficult to specify at the beginning of an appraisal period what the quantity of work required will be, the following performance standard for that element nevertheless lacks measures of quality and timeliness:

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[2] This is a subcommittee of the IAG Committee on Performance Appraisal, an OPM-sponsored group comprised of agency personnel directors, their representatives, and line managers, formed to provide a forum for sharing information about performance appraisal systems and techniques.

> "Must be able to prepare letters, memoranda, etc., and determine the appropriate format to be used. Must be able to prepare documents requiring various formats, including charts with tabulations and layouts with internal or subordinate breakdowns. Additionally, must be able to personally draft responses when routine questions or requests for information are involved."

This standard simply restates the employee's duties. Assuming quantity is all work, this standard does not specify how well the work should be done or how soon the work should be done. A supervisor using this standard would have difficulty in objectively evaluating the employee's performance.

Standards reviewed at VA for a comparable position, on the other hand, were more measurable and often contained criteria on expected levels of quality and timeliness. For example, performance standards for a VA secretary stated:

> "Takes and transcribes dictation from supervisor and staff; attends meetings in order to take minutes, so that over a twelve month period no more than seven items of correspondence, summaries of meetings, or other typed material must be returned to the incumbent due to any type of errors, such as transcription, typing, punctuation, spelling, or failure to cover all salient points in a summary of a meeting.
>
> "Fails to meet the timeliness requirements established by the supervisor at the time of work assignment on no more than four occasions during a one year period."

VA's standards for nonclerical positions were also more measurable. For example, a performance standard for a claims examiner stated:

> "Regulations, manuals and other technical and reference material will be maintained in such a manner that all materials distributed will be filed in the approved manner within six (6) workdays with no more than six exceptions during a 12-month period."

Although these standards do not clearly identify quantity, they include measures of quality and timeliness that provide the supervisor with a basis for determining whether the employee met, exceeded, or failed to meet job requirements.

Unless standards are measurable, agencies may not be able to support personnel actions based on appraisal results. For example, in November 1979, MSPB reversed an agency's decision to remove an employee. MSPB's action was based on its finding that the employee's performance standards were actually subjective judgments and did not constitute the objective criteria mandated by the act. Following are examples of that employee's performance standards:

--"work review will be thorough, accurate, etc."

--"insures accuracy and completeness of information on all forms," and

--"instructions will be clear and complete."

These standards, unlike those at VA, are similar to many of the standards used at the three agencies reviewed. Thus, without at least some quality, quantity, or timeliness measures, such as those identified in the Federal Personnel Manual, agencies may have difficulty meeting the statutory requirement for accurate evaluations based on objective criteria.

Standards need to differentiate between performance levels

As stated by the IAG, standards that clearly differentiate between performance levels greatly increase the supervisor's and employee's ability to accurately appraise performance. If standards do not differentiate between performance levels, supervisors will have difficulty in objectively determining employees' levels of performance and in justifying their ratings.

Our review of the four agencies [3] showed that standards often were written without distinguishing between satisfactory and the next highest or lowest levels. The following table shows the number of standards at each agency for which such distinctions could be made.

	Percent of standards in GAO's analysis that distinguish satisfactory from the:	
Agency	Next highest level	Next lowest level
HUD	3	11
FTC	0	0
DOI's OS/IG	0	0
NPS	11	14
VA	20	94

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[3] VA, HUD, FTC, and two subagencies of DOI: OS/IG and NPS.

The following standards, created for an NPS Supervisory Park Technician, typify the difficulty in distinguishing between various performance levels.

--Hazardous conditions are recognized and actions taken to avoid an accident. Supervisor is immediately notified of hazardous conditions.

--Equipment utilized for assigned operation is inspected regularly.

--Subordinate (seasonal) employees receive training necessary to use equipment and perform all duties safely.

Because the standard is vague and does not contain concrete measures of quality, quantity, or timeliness, the supervisor would have difficulty determining whether the employee's performance met, did not meet, or exceeded the standard. This same problem existed in all four agencies.

In contrast, another NPS Park Technician had the following standard related to handling correspondence, which, if appropriate and trackable, does distinguish between performance levels:

> "Assigned correspondence is handled in a timely manner. 90-94% of all correspondence is ready for mailing in three working days of receipt at employee's desk."

This standard is stated clearly. Both supervisor and employee can clearly identify what performance meets, does not meet, or exceeds the standard.

Standards need to clearly identify unacceptable performance

The act established procedures intended to make it easier for agencies to take corrective actions. However, such actions must be based on unacceptable performance as defined in the standards. Now, agencies can remove or downgrade employees who have failed to meet the performance standards for one or more critical job elements, regardless of how well they perform other elements.

OPM suggests that each agency establish standards that clearly identify levels of performance. If such levels are clearly presented, the agency would be justified in taking action against any employee failing to meet acceptable levels.

In our review, few agencies clearly identified what unacceptable levels of performance were. For example, HUD identified them in only 9 percent of the standards we reviewed; FTC and DOI's OS/IG never identified them; and NPS identified them in 14 percent of the standards we reviewed. VA standards, on the other hand, identified unacceptable levels in 95 percent of the standards reviewed.

The following is an example of standards containing unclear levels of performance. They were used for three critical elements of a HUD Management Assistant.

--References are accurately identified.

--All reports are prepared by due date.

--Charts are neatly and accurately prepared within appropriate time limits.

By using these standards, an agency may not be able to sustain a performance-related action or even an unsatisfactory rating if the employee did not correctly identify one reference, completed a report 2 days late, or prepared a chart that was not neat.

In contrast, VA often defined the satisfactory level so that the unacceptable level of performance was clearly identifiable. For example, a contract representative had to meet the following standards:

--Errors involving additional development from forms and applications completed in the personal interview unit and telephone interview unit will not exceed three.

--Performance for conducting employee training sessions is satisfactory when the average training session evaluation score is between the range of 4 to 7.

With the above standards, the unacceptable level of performance is identifiable. Both supervisor and employee know that more than three errors or an average training evaluation score of less than four will result in an unsatisfactory rating for those job elements.

Standards should allow the satisfactory level to be exceeded

According to the IAG, competent employees should be able to meet standards at the satisfactory (fully successful) level, and the above-average performer should be able to exceed them. Standards for the satisfactory level should not be set at a level that cannot be exceeded. Yet our analysis showed that agencies are establishing standards at the satisfactory level which cannot be exceeded. Specifically, our analysis showed that 78 percent (546 of 702) of the standards at the satisfactory level we reviewed could not be exceeded.

At FTC, for example, one fully successful level standard for a clerk typist stipulated that all legal, economic, and technical words had to be spelled correctly in all typed documents. Another FTC fully successful level standard required consumer protection specialists to perform accurate, complete, and timely research that reached a sound conclusion on all matters. According to both these standards, better than fully successful performance is impossible. As a result, employees cannot determine what level of achievement is necessary to receive an outstanding rating, or if an outstanding rating is even possible.

Agencies need to improve standards in subsequent appraisal cycles

It would be unreasonable to expect that Federal managers and supervisors could write perfect performance standards for the first period. However, it is important that they refine and improve performance standards in subsequent appraisal periods.

We compared performance standards for the two recent appraisal periods at three agencies [4] and determined that little improvement in the quality of performance standards had taken place from one period to the next. Often, agencies continued to use the same standards established in previous periods. In fact, at two of the three agencies, the same standards were adopted from one period to the next for 32 of the 40 employees in our review (80 percent). At HUD, standards underwent substantial revision due to the change to multiple level definitions.

The following table, based on GAO's analysis, shows that, in terms of quality, quantity, and timeliness, little improvement has occurred in the percentages of standards that include these measures.

	Percent of standards in GAO's analysis with measures of:					
Agency	Quality		Quantity		Timeliness	
	prior period	later period	prior period	later period	prior period	later period
HUD	49	54	28	39	42	46
FTC	25	32	36	36	10	12
DOI's OS/IG	65	65	8	8	30	38
NPS	50	50	45	45	38	38

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[4] HUD, FTC, and two subagencies of DOI: OS/IG and NPS.

As the table shows, DOI's OS/IG added a few more timeliness measures to its standards during the more recent appraisal period, and FTC added a few more quality and timeliness criteria to its standards. Only HUD improved somewhat in all three areas for its later appraisal period. However, overall, the changes in measurability were small.

HUD revised its standard-setting process and was also the only agency of the three to improve in differentiating between performance levels and in clearly identifying unacceptable performance. During HUD's previous appraisal period, 28 percent of its fully satisfactory standards could be exceeded, but almost 33 percent could be exceeded in the later appraisal period. In addition, HUD now defines the unsatisfactory performance level, and these definitions clearly identified unacceptable performance for 14 percent of the standards we reviewed for the later period. Although this percentage is still low, it is an improvement over the previous period, when only 5 percent of the agency standards we reviewed clearly identified unacceptable performance.

Performance standards at DOI's OS/IG improved during the current appraisal period in regard to the degree to which they define satisfactory levels which can be exceeded. However, a lower percentage of standards defined satisfactory levels that could be exceeded at FTC and NPS during the most recent appraisal period than during the previous appraisal period. At NPS, fewer of the standards clearly identified unacceptable performance in the later appraisal period than during previous periods. None of the standards reviewed at FTC and DOI's OS/IG clearly identified unacceptable performance.

Most agency plans we reviewed did not provide for a review of standards at the beginning of the period nor were such reviews generally taking place. At the three agencies where we conducted employee interviews, reviewing officials reported that they reviewed standards at the beginning of the previous period for only 18 of those 55 employees (33 percent). Only two changes occurred as a result of these reviews. The number of employees whose elements and standards were reviewed for the later period decreased to only 16 of the 55 employees (29 percent). Thus, agency officials did not review standards at the beginning of the period for most of the employees we interviewed.

If agency officials would review standards when they are established at the beginning of the period, they could make sure that the standards are well written and comparable to those for other employees in similar positions. For instance, 20 of 29 reviewing officials we interviewed claimed responsibility for reviewing standards and ratings for groups of employees in comparable jobs. These officials are, therefore, in a position to judge whether standards for employees in the same job series and at the same grade level are comparable and of reasonable difficulty.

More effective actions needed to improve standards

In an IAG survey of Federal agencies conducted in June 1982, 36 of the 39 responding agencies (94 percent) claimed that difficulty in developing meaningful performance elements and standards was the single largest problem in performance management.

OPM's efforts to assist agencies in improving the quality of elements and standards have consisted primarily of the following:

- --Publishing an April 1981 Performance Standards Handbook for use as a reference guide by managers and supervisors in developing elements and standards.
- --Forming a clearinghouse to distribute sample standards developed by agencies for 200 different positions, available upon request.
- --Conducting training courses on setting performance standards for agencies nationwide.
- --Providing technical assistance to agencies upon request.

Officials at six of the nine agencies we visited said they did not use the handbook and sample standards in developing their performance standards. Officials from the other three agencies we reviewed said that they had used the handbook to help in setting standards. OPM officials acknowledged that the handbook's sample elements and standards were not as useful as they could have been, especially for inexperienced supervisors, and that may have limited their use by the agencies.

According to OPM records, the clearinghouse received 782 requests for standards. Some agencies we visited had problems with the standards distributed by the clearinghouse. Management officials from three of the agencies said that the standards were not helpful. The Acting Director of OPM's Performance Appraisal Service Division acknowledged that they were not good examples for agencies to use as models. OPM neither revised nor improved the elements and standards agencies provided to the clearinghouse. Because of the declining number of requests, the clearinghouse was terminated in July 1982. OPM officials have told us that instead of the clearinghouse, OPM is considering providing assistance to the agencies through development of generic standards that would apply to large occupational groups.

Agencies could then use these standards as models for their employees because they would contain all desired characteristics, be directly applicable to all employees in those occupations, and allow for comparison among employees in the same job series and at the same grade levels.

Since passage of the act, OPM has offered two training courses that primarily deal with setting standards. The first course, "Setting Performance Standards," has been offered since October 1979. It was heavily attended during 1980 and 1981, but participation dropped considerably in 1982. The second course, "Implementation and Use of Performance Standards," has been available since October 1981 and has not been heavily attended.

Employees from six of the nine agencies we reviewed had attended OPM's training courses. They reported mixed reactions: 44 percent felt the training was good to excellent; 56 percent felt the training was not useful. Those agencies and locations which did not participate in OPM's courses said most frequently that budget constraints and OPM's lack of agency-specific knowledge were the principal reasons.

To assist agencies in improving their performance standards, the IAG in 1981 established a subcommittee on the quality of elements and standards. In October 1981, the subcommittee conducted a survey of IAG member agencies to determine specific problems and actions agencies had taken to improve the quality of standards. While 34 agencies reported specific actions to improve the quality of elements and standards, the most commonly cited action was "further study by task forces, outside consultants, etc."

In July 1982, the IAG subcommittee prepared a diagnostic guide to analyze the quality of elements and standards which may prove useful to agencies in their attempts to make improvements in the future. Officials at three of the agencies we reviewed found this guide helpful and have encouraged their supervisors to use it when they prepare standards in future appraisal periods.

CHAPTER 3

IMPROVEMENTS NEEDED IN THE WAY APPRAISALS ARE COMPLETED AND USED

The Reform Act requires the use of appraisals as a basis for making personnel decisions. Several agencies we visited had begun to use appraisal results as a basis for personnel decisions such as awards, within-grade increases, and removals.

However, we identified several factors which may restrict the use of appraisals as a basis for making personnel decisions. We have already discussed the problem in not communicating standards at the beginning of an appraisal period and problems in the quality and measurability of standards. In addition, we identified problems related to the timeliness and manner in which appraisals were completed. Strategies for linking appraisal results to personnel decisions remain vague at many agencies, and legal decisions may have obscured the act's attempts to facililitate the process of taking corrective actions on poor performers. Finally, more active monitoring and evaluation efforts by OPM and agencies are needed to identify additional problem areas and to ensure actions are taken to refine performance appraisal systems.

TIMELINESS AND MANNER OF COMPLETING APPRAISALS NEED TO BE IMPROVED

According to the Federal Personnel Manual,

> "the primary purpose of the periodic appraisal is to assure that supervisors regularly review employees' performance, give employees feedback about their performance, and provide information needed for various personnel decisions."

However, in some cases appraisals were not completed until long after the end of the appraisal period. We also identified problems in how agencies used their summary rating systems and review procedures. These problems also reduce the usefulness of information provided to employees as feedback on how to improve their performance.

Appraisal and feedback need to be timely

For written appraisals and employee counseling sessions to be useful for personnel decisions and feedback purposes, the information provided must be timely. The Federal Personnel Manual on improving performance appraisal states that "employees should be kept currently informed about the quality of their performance and promptly notified of their appraisals."

The act requires employees to be evaluated during the appraisal period, but neither the act nor OPM regulations specify how promptly appraisals should be completed. OPM regulations require that employees be appraised, in writing, at least annually, but regulations do not indicate how long after the end of the appraisal period the actual rating must be completed.

Consequently, agency plans and policies vary greatly on when performance ratings are due at or after the end of an appraisal period. Six of the nine agency plans we reviewed did not specify a due date for final ratings. Those agencies or their subagency components that did, established due dates ranging from 30 to 45 days after the end of the appraisal period. Completed appraisals at NPS are not due until 3 months after the period has ended.

The agencies we reviewed which had completed an appraisal period generally did not use internal monitoring systems to insure appraisals were completed or to enforce compliance with agency-established due dates. In addition, most agencies had not compiled statistics on compliance with the due dates. Some agencies, such as HUD, had begun to computerize appraisals so that their completion and timeliness can be more easily monitored in the future.

At agencies with available statistics, we noted the following:

--At NPS, appraisals for the first period were due on March 31, 1982, 3 months after the period ended on December 31, 1981. However, we found that 78 percent of the ratings had not been received on time in the personnel office of the North Atlantic Region. In the Western Regional Office, 67 percent of the ratings had not been prepared by the supervisors by March 31, 1982. In both these regions, the personnel offices did not receive all the appraisals until the end of June, 6 months after the end of the period.

--At DOI's OS/IG, headquarters officials said that 37 percent of the appraisals were not received by the due date of October 30, 1981, which was 30 days after the end of the appraisal period.

In DOI's OS/IG Western Region, a personnel decision was reversed because the appraisal was late. The appraisal period ended on September 30, 1981, and an employee's within-grade increase was due on November 1, 1981. However, the appraisal which showed unsatisfactory performance was not completed until March 1982, over 5 months after the end of the appraisal period. The employee was notified of a determination to deny his within-grade increase in July. As a result of the delay in preparing the appraisal, the decision to deny the increase was reversed when the employee filed a grievance.

Delays in completing appraisals also compromise the usefulness of feedback information to employees who wish to improve their performance. This is especially true at agencies that do not require interim evaluations or counseling sessions. Five of the nine agencies in our review encouraged, but did not require, interim appraisals, but management officials at all nine agencies said progress reviews were taking place. However, interviews with employees at three of the nine agencies did not support these claims. Forty-two percent of the 55 employees we interviewed said they received no interim appraisals or feedback, and 36 percent felt that they did not receive adequate feedback on their performance from the appraisal process.

Summary rating systems need further scrutiny

When using appraisal results in personnel decisions, many agencies rely on the overall or summary rating rather than on ratings for individual elements. This is especially true when deciding on awards. Agencies have developed a wide variety of summary rating systems. Some involve complicated weighting factors for each element or elaborate mathematical procedures for arriving at the summary rating. According to OPM officials, some agencies' systems do not provide for summary ratings.

At the nine agencies we reviewed, we found a variety of problems with the summary rating systems, and many employees did not understand or had difficulties with them.

For example, NPS adopted a complicated mathematical conversion system for translating initial element ratings to overall summary ratings. In this system:

--The method for mathematically converting individual element ratings to one summary rating was complicated and cumbersome for supervisors, and they frequently cited this as a disadvantage of the system.

--Descriptions of the summary rating levels obtained through the conversion process did not accurately reflect the actual initial ratings used in attaining those summary levels.

At HUD, the summary rating levels were defined in the performance appraisal plan, but the procedures for arriving at those levels were ambiguous. Four of the five employees interviewed at the Boston Regional Office did not understand what was needed to be rated at each level or how the summary rating was determined.

At one organizational unit in DOT, the mechanism used to arrive at the summary rating involved a complicated weighting process for each element. Supervisors assigned weighting factors ranging from 10 to 100 percent to critical elements and factors ranging from zero to 100 percent to noncritical elements. One possible problem resulting from this method is that critical elements assigned lower weights than the noncritical elements could end up having less impact on the summary rating than noncritical elements.

In March 1981, OPM informed agencies that 5 U.S.C. Chapter 43 requires that a performance rating on any element cannot be extrapolated more than one level above or one level below a level for which there is a written standard.

In order to comply with this, many agencies where single standards were written established systems which evaluate individual elements at only three levels (such as Outstanding, Satisfactory, and Unsatisfactory), while the summary ratings based on these evaluations distinguish among five levels of performance (such as Outstanding, Highly Satisfactory, Satisfactory, Minimally Satisfactory, and Unsatisfactory). Several supervisors expressed frustration in appraising employees through such summary rating systems. They pointed out that it took a great deal of subjectivity to combine the ratings of individual elements containing three levels into one summary rating containing five levels. Supervisors described the dilemma as follows:

--A Highly Satisfactory summary rating cannot be based on "highly satisfactory" performance on all or most of his or her elements, but on a combination of some outstanding and some satisfactory performance. If the employee cannot be fairly described as "outstanding" on any individual element, the summary rating is automatically skewed down to a Satisfactory.

--A Minimally Satisfactory summary rating cannot be based on "minimally satisfactory" performance on all or most of his or her elements, but on a combination of some satisfactory and some unsatisfactory performance. If the employee cannot be fairly described as "unsatisfactory" on any individual element, the summary rating is automatically skewed up to a Satisfactory.

Better review processes needed to ensure accurate and consistent ratings

Reviewing officials carefully reviewing ratings at the end of performance appraisal periods could help ensure that performance is accurately and objectively measured against the preestablished standards, and that ratings are not inflated from factors that are unrelated to the job. Most of the agency plans we reviewed provide for some type of review of the final ratings. While these reviews generally did take place, reviewing officials said that they were often merely perfunctory.

At the three agencies where we conducted employee interviews, officials did not review the final ratings for 9 of the 55 employees. In the remaining 46 cases, officials reviewed 42 cases after the ratings had already been given to the employees. Four of the reviews took place before the ratings were given to the employees. None of the reviewing officials we interviewed, however, made changes as a result of their reviews. OPM officials have pointed out that reviewing officials are less likely to suggest changes to a rating after the employee has seen it, and in such cases the review process often becomes a mere formality.

One reason reviewing officials offered for not being more actively involved in their reviewer roles was their uncertainty about the objectives of the reviewer's role. Of 28 reviewing officials we interviewed who had received training on the performance appraisal system, 10 (36 percent) felt that training had not adequately prepared them for their roles as reviewing officials.

LINKAGES BETWEEN APPRAISAL RESULTS AND PERSONNEL ACTIONS AND AUTHORITY TO TAKE CORRECTIVE ACTIONS NEED TO BE CLARIFIED

The successful appraisal system, according to the act, requires a clear linkage between appraisal results and personnel decisions. However, employees we interviewed did not perceive a linkage between their appraisals and the resulting personnel decisions. A number of officials believed the act did little to support the taking of corrective actions.

Clear linkages needed to improve employee motivation and productivity

In a report we issued prior to passage of the Civil Service Reform Act, "Federal Employee Performance Rating Systems Need Fundamental Changes" (FPCD-77-80, Mar. 3, 1978), we reported that Federal agencies had not linked performance evaluation results to personnel decisions and that employees did not perceive a direct relationship between performance evaluation and rewards. [1] We concluded then that there was no assurance that a new performance evaluation system would be effective unless a meaningful linkage was established.

As stated, the act requires agencies to develop performance appraisal systems that use appraisal results as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees. OPM regulations further specify that each appraisal system must include statements of how appraisals are to be used as a basis for personnel decisions. Or, if such an explanation is not contained in the system, the agency must let its employees know where this information may be found.

In many agency plans, the linkages between personnel decisions either continue to be vague or are not even mentioned. Seven of the nine agency plans reviewed simply reiterated the regulatory requirement that appraisal results are to be used as a basis for some or all personnel decisions. They did not specify how they planned to link the results to the decisions. Some officials we interviewed remarked that "supervisory judgment is still more important than the appraisal," and "appraisals are peripheral to personnel actions."

Not surprisingly, at a number of agencies, we found indications that employee attitudes remain the same as before passage of the act. Surveys taken by two agencies in our review showed that, after the end of the first appraisal period, many employees still did not see a close link between appraisals and personnel decisions:

--ICC surveyed a sample of its employees in January 1982, after the first appraisal period had been completed. When 520 employees were asked whether they felt that the performance appraisal system had an effect on personnel decisions such as promotions, awards, or disciplinary actions, 56 percent answered "no" or "don't know."

--In May 1982, NPS surveyed its employees after the first appraisal period had been completed. In its report, NPS concluded from the results: "A strong perception appears to exist that no meaningful link is made between performance appraisal ratings and personnel actions . . ."

In our interviews with 55 employees at HUD, FTC, and DOI's OS/IG and NPS, we found that employees believed that only 20 percent of the 94 personnel decisions affecting them since implementation of the new systems were based on their performance appraisals, and 67 percent said that the appraisals were not a reason for the actions taken. [2] Thirty out of 47 (64 percent) of these employees' supervisors also failed to perceive any linkages between appraisal results and personnel decisions.

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[1] OPM's 1979 survey, "Federal Employee Attitudes--Phase 1," identified similar problems with linkage and with employees' perceptions of the linkage relationship.

VA has established some clear and specific strategies of how to use appraisal results in making personnel decisions, with the result that employees' attitudes are changing. According to VA officials at one location, employees who previously thought appraisals were meaningless have begun taking them more seriously as a result of the number of personnel actions taken during the first period. One VA official told us that, as of May 1982, with the beginning of the new performance appraisal system, 4 within-grade increases were withheld, 15 employees retired or resigned because they anticipated receiving less than satisfactory ratings, and 2 employees were removed for unsatisfactory performance. Conversely, VA's performance appraisal plan states that anyone receiving an outstanding rating should be considered for an award or a certificate of achievement. However, no data on awards was available at the time of our review.

A VA adjudication official in that region said adjudicators increased their average output rate above the established standard at the end of the first appraisal period. This indicated to him that the strong linkages between appraisal results and personnel decisions can motivate employees to improve their performance.

There were several indications that when employees understood the linkage between appraisal results and personnel decisions, their performance improved. Further, we found a high correlation between supervisors who perceived those linkages exist and those who believed that the new system encouraged performance improvement. Out of 47 supervisors, 14 perceived such linkages existed and 13 of the 14 felt performance improvement had been encouraged. However, only 10 of the remaining 33 supervisors who did not perceive that such linkages existed felt the systems encouraged performance improvement.

Authority to take corrective actions needs to be clarified

An important feature of the Civil Service Reform Act's performance appraisal system was to enable supervisors to identify poor performers and to take appropriate corrective actions. A report to the President [3] prior to passage of the act indicated that inadequate procedures and overwhelming paperwork were the biggest obstacles to taking performance-related actions. Consequently, the act included a variety of provisions to address these problems.

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[2] With respect to the remaining 13 percent of personnel decisions, employees responded "don't know" or gave no response.

One of the most significant provisions was the reduction in the amount of evidence required to support performance-related adverse actions. The previous authority, 5 U.S.C. Chapter 75, required a preponderance of evidence to support all adverse actions. Now under section 4303 of title 5, only substantial evidence is required to support reducing in grade or removing a poor performer, if appealed. [4] This provision was intended to make it easier for supervisors to take appropriate action when poor performance had been identified and documented.

In a legal decision (Schramm vs. the Social Security Administration, June 1982), the U.S. Third Circuit Court of Appeals departed from earlier rulings and held that a greater amount of evidence is required to deny a within-grade increase than to demote or remove an employee. This anomaly resulted from the fact that section 4303 of the act cites only reductions in grade and removals as performance-related actions that can be justified by the lesser "substantial level of evidence" standard. The court acknowledged that its decision presented this anomaly, but said that the situation must be corrected by the Congress, not by the courts nor by MSPB.

Many agency officials do not believe that the act has streamlined the process for taking corrective actions in the Federal Government. At the various locations of the nine agencies we visited, fewer than half of the officials interviewed believed that the new performance appraisal systems made more than a moderate improvement in their ability to make personnel decisions, and several officials thought there was little or no improvement. A number of officials commented that "negative actions still require extensive time, effort and paperwork," and "the system is the same as before passage of the act." [5]

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[3] Report from the President's "Personnel Management Project," (1977).

[4] According to 5 CFR Sec. 1201.56(a)(3)(c):

> Preponderance of the evidence: That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true [at least 51 percent of the evidence].
>
> Substantial evidence: That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true [not necessarily 51 percent of the evidence].

MORE ACTIVE MONITORING AND EVALUATION EFFORTS ARE NEEDED

If agencies evaluated their own performance appraisal systems and surveyed their employees' attitudes toward them, the resulting information could help the agencies to identify problem areas and to improve their systems. At the agencies we reviewed, evaluation efforts were limited in scope, and information on employee attitudes was lacking.

Evaluations of agency and subagency appraisal systems are needed

OPM regulations require that agencies establish methods for (1) periodically evaluating the effectiveness of their performance appraisal systems and (2) improving the systems when appropriate. However, we found that most agencies and locations we reviewed had not yet evaluated their performance appraisal systems, and several officials said their agencies had no specific plans to do so in the future.

The act also requires that OPM review agency performance appraisal systems for compliance with statutory and regulatory requirements, and that it direct agencies to make necessary corrections. At the time of our review, OPM's monitoring and evaluation efforts were limited in scope. Its monitoring effort consisted mostly of requesting agencies to certify that they had complied with the October 1, 1981, deadline for establishing performance standards for all employees. Its evaluation effort consisted of approving appraisal plans at the department or agency level and conducting a small number of case studies, special studies, and reviews of performance appraisal systems at selected agencies and locations. At the time of our review, OPM had conducted comprehensive compliance evaluations of performance appraisal system implementation at three agencies. This is very limited in view of the total number of systems implemented Government-wide.

OPM's approval process generally applied to the department or agency-wide plans, even when the department or agency had delegated the task of developing detailed performance appraisal system plans to their organizational units. While those units' plans had to conform to the policies and procedures of the department or agency, these organizational units frequently operate independently. Many had developed their own appraisal plans with little or no involvement from either the agency or OPM.

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[5] GAO is continuing work in this area to assess whether selected agencies have used their performance appraisal systems as a basis for personnel decisions and, if they have, how well it has worked.

In addition, when approving an agency's plan, OPM frequently cited changes which were either required or recommended before implementation, but OPM did not follow through to ensure that those changes had been made.

The evaluations conducted by OPM or by the agencies themselves have frequently identified problems and indicated ways agencies could improve their systems, demonstrating the value of such evaluations. For example:

--An agency study found that evaluations of performance appraisals at Norton Air Force Base, California, did not show that standards were exceeded when awards were granted. To correct this finding, the evaluation stated, "recommendations for awards and superior ratings must be documented by ratings showing standards were exceeded."

--OPM found that while performance standards at the Federal Prison System in Burlingame, California, were objective and trackable, many were based on negative measures (e.g., excellence meant staying out of trouble). OPM recommended setting positive accomplishment objectives for performance levels above satisfactory.

--OPM found that many positions at the Naval Construction Battalion Center, Davisville, Rhode Island, were rated only on critical job elements. OPM warned the Navy that many personnel decisions are based on these ratings and that the official performance record may lack very valuable data because of not rating the noncritical elements. OPM further suggested monitoring performance standards for consistency across organizational lines.

Assessments of employee attitudes are needed

For successful implementation of an appraisal system, employees must accept it and have confidence in it. Further, their attitudes toward the system can provide useful insights into the system's problems. However, our review indicated that agencies were receiving little feedback from non-SES, nonmerit pay employees.

OPM administered its Federal Employee Attitude Survey in 1979 to provide a baseline of Federal employee attitudes prior to implementation of the new performance appraisal systems. A second attitude survey in 1980 covered only merit pay employees, and a third survey, to cover non-merit pay employees, was scheduled for late 1981. However, that third survey was postponed and was not sent to employees until August 1983. Therefore, no valid nationwide data is yet available on General Schedule employees' attitudes toward the new appraisal system.

Two of the nine agencies we reviewed had conducted attitude surveys of their own, and officials were optimistic that the findings could be used to assist them in refining their performance appraisal systems. NPS conducted an attitude survey prior to implementing its new appraisal system and resurveyed its employees a year later to determine employee acceptance and to identify initial problems with the new system. According to the survey coordinator, the findings will be used to modify the system. ICC also conducted a survey of employees' attitudes after completion of the first period under their new appraisal system, and the results were being studied at the time of our review.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

Federal agencies did well to design and implement their performance appraisal systems for General Schedule employees required by the Civil Service Reform Act. So far, we believe the major benefits to be better communication on, and better understanding of, employees' work requirements and expected levels of performance.

The standard-setting process of the new performance appraisal systems has led to this improved communication between supervisors and employees. It has increased employees' understanding of their responsibilities, particularly where standards have been jointly prepared and agreed to. The extent of employee involvement, however, varied considerably during the standard-setting process at the agencies reviewed, with some agencies involving only a few employees in this process.

Because the number of employees and supervisors who felt their agency had encouraged employee participation in the standard-setting process declined in the second appraisal periperiod, we believe agencies need to continue their emphasis on employee participation in, and timely communication of, performance standards at the beginning of each appraisal period. Agencies and employees need to view performance appraisal as a dynamic process requiring continual attention and communication.

The agencies and OPM also need to make efforts to ensure that employees' performance standards meet the characteristics established in the Federal Personnel Manual for good standards. Standards should contain quality, quantity, and timeliness measures; distinguish one level of performance from another; identify unacceptable performance; and contain measures below the highest level that can be exceeded. Standards need to be clearly stated and measurable so that agency managers and supervisors can make objective and accurate performance appraisals and use appraisal results as a sound basis for personnel decisions.

Because of the disparity in the levels of communication and in the quality of standards, a second level review of employees' standards at the beginning of appraisal periods could help ensure that both communication and quality of standards would improve. A review of standards at the beginning of each appraisal period by a higher level reviewer could also help ensure that employees in the same job series and at the same grade level have comparable standards and that those standards are of reasonable difficulty. OPM's development of generic standards for large occupational groups that contain the desired characteristics of measurability would facilitate this process.

Despite the need to improve the quality of standards at many agencies, we found that OPM and the agencies we reviewed have taken only limited actions to do so. To ensure that benefits intended by the act are continued and that performance standards provide a sound basis for use of appraisal results in personnel decisions, OPM and the agencies need to further refine performance standards and the standard-setting process.

The successful use of appraisals as a basis for personnel decisions and as useful feedback to employees requires timely, valid, and accurate ratings. Agencies need to ensure that employees receive interim performance feedback and accurate written appraisals that have been reviewed by higher level officials at the end of each performance appraisal period. To help ensure that the formal appraisal process provides valid data, OPM should review agencies' processes for deriving overall summary ratings from the individual elements ratings to ensure they provide for consistent and fair ratings.

While some agencies have taken steps to establish clear linkages between appraisal results and personnel decisions, the linkages to personnel decisions are vague or not even mentioned in some agencies' appraisal plans. From the limited information available about employee attitudes, we believe that perceptions at many agencies about the usefulness of appraisals as a basis for personnel decisions have not changed significantly since before the act. Employees continue to perceive the relationship between appraisals and personnel decisions as limited or nonexistent, and supervisors remain unconvinced that the act has streamlined the process of taking corrective actions against poor performers. OPM could assist agencies by proposing an amendment to the act clarifying that denials of within-grade increases are performance-related actions covered under section 4303. This would eliminate the current anomaly of requiring a greater level of evidence for a less severe action.

More active evaluation efforts by both the agencies and OPM, including the gathering of Government-wide information on employee attitudes, could help agencies identify additional problem areas and improve their performance appraisal systems.

We cannot project that all the problems identified at the nine agencies reviewed apply to all Federal agencies. Problems with standard-setting, however, were prevalent in all three agencies where we did a 2-year analysis. Each of the nine agencies reviewed had some problems with the way appraisals were completed or used. Many of the agencies' problems occurred in areas already covered to some degree by law, Federal regulations, or OPM guidance. Many of the provisions in the law and regulations are not specific, and the differences in agencies' approved systems reflect this. OPM guidance however, is more specific and agencies were either not following or not fully complying with these provisions. Therefore, GAO believes the Director, OPM, should, pursuant to his responsibilities in the Civil Service Reform Act (5 U.S.C. 4304) , direct agencies to take appropriate action that will result in:

--Establishing performance standards that, to the maximum extent feasible, contain quantity, quality, and timeliness measures and that clearly distinguish between performance levels.

--Requiring, rather than encouraging, employees to participate in the development of standards and receive them at the beginning of each appraisal period.

--Requiring that appraisals be completed, reviewed, and communicated to employees within a specified time after the end of appraisal periods and that procedures for deriving summary ratings are more clear.

--Requiring some type of interim feedback be given to employees at least once during the appraisal period.

--Providing guidance on the establishment of clear and specific linkages between appraisal results and personnel decisions.

--Improving the evaluation of performance appraisal systems.

GAO recommends that the Director, OPM:

--Require a second level review of employees' performance standards at the beginning of appraisal periods to ensure that those standards contain the desired characteristics of objectivity and measurability.

--Research the potential value of generic standards for large occupational groups that agencies could use as a basis for developing specific standards for employees in those occupations.

--Develop and propose an amendment to the Civil Service Reform Act clearly stating that denying a within-grade increase is a performance-related action covered under section 4303.

AGENCY COMMENTS

The Office of Personnel Management (OPM) generally concurred with our conclusions and recommendations. Preceding its specific responses to those conclusions and recommendations, OPM noted its awareness of the need for agencies to continue improving their performance standards and stated it would continue its efforts to ensure that this occurs and that agencies use appraisal results for performance-related decisions. OPM identified specific efforts designed to improve performance management. First, OPM combined the performance appraisal, merit pay, and performance awards programs into the Office of Performance Management. This office will develop policy and guidance, oversee agencies' compliance with policy, and evaluate agencies' systems. Second, OPM intends to perform more program specific evaluations to augment the evaluations performed by the Office of Agency Compliance and Evaluation. Third, OPM intends to issue a comprehensive package of regulations and Federal Personnel Manual guidance designed to ensure greater uniformity among agency performance appraisal systems. (The implementation of these regulations has been delayed legislatively at least until October 15, 1983.) Finally, OPM has established a Performance Management Training Center to provide courses addressing all aspects of performance management and to provide technical assistance to the agencies.

OPM submitted the following responses to our specific conclusions and recommendations.

OPM agreed with the need for agencies to continue improving their performance standards. OPM intended that its proposed regulations would clarify distinctions among performance levels and would establish performance standards that include factors such as quality, quantity, timeliness, and manner of performance. OPM plans to develop and issue additional guidance and provide technical assistance to agencies.

OPM agreed that requiring employee participation in the development of standards at the beginning of each appraisal period is an excellent idea. Concerning the required communication of these standards at the beginning of appraisal periods, OPM responded that its proposed regulations, as well as most agency plans and procedures, contained this provision. OPM expects that its future increase in monitoring and oversight activities will ensure compliance with this requirement.

OPM commented that its proposed regulations also would require completion of ratings at least annually and as close to the merit pay determination as practicable. OPM stated that although the proposed regulations did not mention the timing of ratings for General Schedule employees, it intends to issue guidance to agencies emphasizing the need to communicate appraisals in a timely manner.

OPM's proposed regulations would require that the procedures for deriving summary ratings be consistent with the definitions for rating levels defined in the regulations. OPM intends to require agencies to include these procedures in performance management plans submitted for OPM approval.

According to OPM, many agency plans contain provisions for interim feedback to employees, however, OPM intends to issue guidance to agencies emphasizing the need for such periodic feedback.

Concerning the linkage between performance appraisal results and personnel decisions, OPM commented that its proposed regulations would require direct linkages between appraisal results and within-grade increases, quality step increases, performance awards, and career ladder promotions. The regulations would require that agencies' performance plans detail linkage and the anticipated funding available for merit pay, quality step increases, and awards. OPM stated that it intends to monitor implementation of these plans and that it will continue to study methods to improve the linkage between appraisal results and personnel decisions. OPM also plans to examine ways to improve this linkage and to issue further guidance in this area.

OPM stated that many agencies have not initiated evaluations of their performance appraisal systems, but it has encouraged agency evaluations during informal discussions. In addition, OPM stated that a Federal Personnel Manual letter will be issued to stress the evaluation requirements and to provide guidance on scope and methodology for reviews. As mentioned earlier, OPM's Office of Performance Management plans to conduct specific, detailed evaluations of performance appraisal systems.

OPM concurred with our first recommendation which would require a second level review of performance standards at the beginning of appraisal periods. The proposed regulations would provide for a second level review of performance standards at the beginning of the appraisal periods. The proposed regulations would also require a second level review to approve ratings at the end of the appraisal period and before they are communicated to employees.

In response to our recommendation that OPM conduct research on model or generic standards for large occupational groups, OPM stated it has a major project underway to research the feasibility of developing such standards.

Finally, we recommended that OPM propose an amendment to the Civil Service Reform Act clearly stating that denying a within-grade increase is a performance-related action covered under section 4303. Section 4303 actions require only substantial evidence offered by the agency to support its actions in an appeal to the MSPB under 5 U.S.C. 7701. OPM commented that recent court cases in the Court of Appeals for the Federal Circuit indicate that only substantial evidence is being required to uphold such decisions. OPM also indicated it is considering statutory changes to title 5 which would have the effect of this recommendation.

Methodology for Analysis of Performance Standards

In assessing the quality of performance standards, we used OPM's characteristics of good performance standards as stated in the Federal Personnel Manual, Chapter 430. For each standard selected, we determined whether it

(1) contained quality measures--specified how well the employee should perform or how accurate performance must be;

(2) contained quantity measures--stated how much work is or how many items are required;

(3) contained timeliness measures--indicated how soon or when tasks should be completed;

(4) distinguished performance levels--differentiated between outstanding and highly satisfactory (or next lowest level), between satisfactory from marginally satisfactory (or next lowest level), etc.

(5) contained measures below the highest level that could be exceeded--indicated levels below outstanding that could be surpassed rather than setting the level at perfection; and

(6) identified unacceptable performance--had clear and realistic descriptions of unacceptable performance levels.

Content analysis procedures require that one evaluator initially analyze the standards and that a second evaluator verify the results by performing the same analysis on a sample of the standards. The first evaluator analyzed 951 performance standards, and the second evaluator verified 110 of these standards.

Agency	Performance Standards Analyzed	Performance Standards Verified
HUD	313	31
FTC	191	27
DOI:		
OS/IG	103	12
NPS	234	28
VA	a/ 110	12
Total	951	110

a/Only one year's standards at VA were analyzed. For all other agencies, standards for two periods were analyzed.

For the content analysis to be valid, the two evaluators must have at least an 80-percent agreement on each dimension. In this analysis agreement percentages ranged from 87 percent to 99 percent on the various dimensions.

Glossary

Appraisal period: the period of time that is established by an agency's appraisal system for which an employee's performance will be reviewed.

Critical element: a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase; it may be the basis for removing or reducing the grade level of that employee.

Noncritical element: important, but not critical, aspect of an employee's work. (See definition critical element above.)

Non-merit pay employee: an individual who is not covered by the merit pay provisions of the Civil Service Reform Act.

Non-SES employee: an individual who is not in the Senior Executive Service.

Performance elements: the most important aspects of an employee's work; they may correspond to tasks, duties, functions, responsibilities, performance objectives, performance dimensions, or other components that the job requires.

Performance levels: levels used in an agency's appraisal system to describe how well or how poorly an employee performs on each element of his or her position.

Performance-related actions: actions taken by the agency to deal with an employee's unacceptable performance, as opposed to disciplinary actions which deal with an employee's misconduct. Prior to passage of the Act, both performance-related actions and disciplinary actions were grouped together as "adverse actions."

Performance standards: expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions.

Section 4303 actions: reduction in grade or removal actions based on unacceptable performance.

Subagency: a component of an agency which can establish its own performance appraisal system.

Summary rating system: method of summarizing appraisal information for an employee by an adjective, number, or other means. According to OPM guidance, summarization by itself does not serve the purpose intended by the law.

Unnacceptable performance: performance of an employee which fails to meet established acceptable performance standards in one or more critical elements of that employee's position.

United States
Office of
Personnel Management

Washington, D.C. 20415

JUL 29 1983

Honorable Charles W. Bowsher
Comptroller General of the United States
United States General Accounting Office
Washington, DC 20548

Dear Mr. Bowsher:

We have reviewed the draft report, "General Performance Appraisal Has Improved Communication of Work Requirements but Refinements are Needed", GAO-GGD-83-72. We are pleased that the GAO has found major benefits from the implementation of new performance appraisal systems and that you share with OPM the view that agencies have done well to provide performance plans and standards to 95% of their employees within a fairly short time frame.

The report recognizes that developing performance standards and using the results of appraisals effectively takes time and experience and cannot be expected to be done perfectly the first time. Further, the report notes that in three of the agencies studied, little improvement in the quality of performance standards had taken place from one appraisal period to the next. OPM is aware that agencies need to emphasize improving their performance standards and will continue its efforts to insure that agencies do, in fact, undertake steps to improve the quality of standards and the use of appraisal results.

OPM's efforts fall into four major categories:

- — reorganization of the performance appraisal program into an Office of Performance Management;
- — modification of its approach to evaluation of personnel programs to one that is more program specific;
- — development of a comprehensive package of policy, regulation, and FPM guidance establishing greater commonality among performance appraisal systems; and
- — establishment of a Performance Management Training Center to offer a wide range of courses on the operation and use of performance appraisal systems.

OPM's new Office of Performance Management brings together under one director the previously separate programs of performance appraisal, merit pay, and performance awards, including an analysis and evaluation responsibility. The improvement of performance standards and the more effective use of performance-based incentive systems in agencies is the major work of the Office of Performance Management. The Office is responsible for overseeing the operation of performance appraisal and merit pay and awards programs in agencies, for developing policies to improve performance appraisal and merit pay in the Federal government, and for directing agencies to make changes in their systems to bring them into compliance with OPM policies. The Office provides assistance to agencies in developing and operating their systems, reviews and approves performance appraisal plans, and conducts reviews of agency systems. In addition, the Office develops formal policy (regulations and FPM material) and advisory or guidance documents such as model standards.

While the overall objectives of OPM's evaluation program remain unchanged, the approach used in future years will be modified. Future evaluations of agency programs will be oriented to specific personnel programs. Federal personnel management has been divided into five major areas, performance management (primarily performance appraisal and merit pay) being designated as one of these.

The primary evaluation responsibilities for all five of the program areas will continue to be accomplished by the Agency Compliance and Evaluation (ACE) organization. These reviews of the performance management area will focus on broad program effectiveness, regulatory compliance and cost. The Office of Performance Management (OPerM) augments this effort with agency program studies and reviews that are specific in nature and normally more narrow in scope. The objectives are to improve individual agency programs, highlight areas requiring policy changes, and provide for government-wide program results analysis. Two major studies of performance appraisal and merit pay are currently underway.

On July 14, 1983, OPM published in the Federal Register a comprehensive set of proposed regulations dealing with performance appraisal, merit pay, awards, and a Performance Based Incentive System (PBIS). Those regulations clarify and provide greater precision to policies regarding critical elements, performance standards, summary ratings, and the use of appraisal results in setting pay and rewarding employees. The regulations are designed to have a major impact on improving appraisal systems by linking them more directly to consequences. The regulations are expected to be issued in final in the fall of 1983, and be fully implemented by agencies by the following performance cycle.

The new Center for Performance Management Training is responsible for design, development and delivery of a comprehensive training curriculum covering all phases of performance management. The curriculum includes courses in strategic planning and objective-setting; performance planning, including the development of elements and standards and unit work plans; correcting performance problems; rating performance and evaluating programs; and linking performance to organizational changes and personnel actions. The Center brings together courses previously offered by a variety of OPM training units and in doing so reinforces the integration of management functions, appraisal and personnel actions. Courses are targeted for managers and supervisors, analysts, and specialists, and may be tailored for single-agency delivery in addition to the regularly scheduled interagency offerings. The Center also provides reimbursable technical assistance to individual agencies. In addition, the Federal Executive Institute has recently included in its curriculum a unit on performance management to improve the capabilities of executives to meet their responsibilities in performance management.

Our comments on the specific conclusions and recommendations of the report are set forth below.

The report concludes that OPM should direct agencies to "take appropriate action that will result in establishing performance standards that contain quantity, quality, and timeliness measures and that clearly distinguish between performance levels." The regulations that we have proposed re-emphasize the legal requirements for establishing performance standards, provide definitions that make clear distinctions among levels, and specifically state that a standard "may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance." Further, by developing and issuing additional guidance materials and through our technical assistance program, we will continue to work with agencies to insure that standards are clearly distinguishable between performance levels.

With respect to the recommendation that OPM should "require, rather than encourage, employees to participate in the development of standards and receive them at the beginning of each appraisal period," we have considered, since enactment of the Civil Service Reform Act, a possible requirement for employee participation in developing standards. We strongly believe that employee involvement is fundamental to the success of the performance appraisal system. Making it a requirement that there be direct supervisor-employee communication during the standard-setting process is an excellent idea.

With respect to a requirement that employees receive standards at the beginning of each appraisal period, such a requirement exists in nearly all agency plans and implementing procedures and our proposed regulations would also require that it be done. We fully expect that our increased oversight and monitoring activity will help to ensure that this requirement is met.

The report concludes that OPM should "require that appraisals be completed, reviewed, and communicated to employees within a specified time after the end of appraisal periods and that summary rating systems provide for consistent and fair ratings." Our proposed regulations require completion of ratings at least annually and as close to the merit pay determination as practical for merit pay employees. OPM will issue additional guidance, via the FPM system, to clarify the importance of agency procedures for assuring that appraisals are communicated as well as completed in a timely fashion.

While the proposed regulations do not set forth a process for arriving at summary ratings, they do require that procedures for deriving summary ratings be consistent with the definitions for rating levels set forth in the regulations. In addition, OPM will require agencies to describe their procedures in their performance management plans submitted to OPM for approval.

The report also concludes that OPM should "require that some type of interim feedback be given to employees at least once during the appraisal period." Most agency plans provide for some type of progress review and we agree that it is a good management practice. In FPM guidance to be issued with the new regulations, we plan to give strong emphasis to the importance of periodic feedback sessions.

With respect to the conclusion that OPM provide guidance on the establishment of clear and specific linkages between appraisal results and personnel decisions, our proposed regulations require very direct linkages between appraisal results and within-grade step increases, quality step increases, performance awards and career ladder promotions. In addition, our proposed regulations require that agencies modify merit pay systems, where necessary, to assure that the connection between performance and pay is not only direct but very clear to the employee. The proposed regulations also require that agencies develop, and submit to OPM for approval, plans that describe precisely how performance appraisal results will be used in those decisions, including projections of expected funding for merit pay, quality step increases, and awards. OPM will closely monitor the execution of these plans.

OPM recently issued an FPM Letter (751-2) entitled "Taking Action on the Problem Employee" and an accompanying Personnel Management Series Handbook (751-A) which provide information and guidance to managers for dealing with poor performers. We will continue to examine ways in which to improve the linkage between appraisal results and personnel decisions and expect to issue additional guidance.

The report also concludes that OPM should direct agencies to take actions to "improve the evaluation of performance appraisal systems." As the report points out, OPM regulations require that agencies evaluate and improve their systems and the law requires that OPM review agency performance appraisal systems and direct agencies to make necessary corrections. In many instances, agencies have not yet undertaken evaluation efforts, although several have begun efforts to do so.

Although it is expected that OPM's monitoring and oversight activities will result in increased self evaluation activity in agencies, several additional actions are currently underway to assure that this occurs:
1) Self evaluation is being emphasized informally in discussions between Office of Performance Management (OPerM) and agency staff;
2) Evaluation applications will be a subject of future program evaluations accomplished by Agency Compliance and Evaluation (ACE) and Office of Performance Management; and 3) a Federal Personnel Manual (FPM) letter is being prepared to reemphasize the evaluation requirement to agencies and to provide guidance on scope and effective methodology for program review.

As to OPM's responsibility to review systems and direct agencies to make corrections, the Office of Performance Management has within it an Analysis and Evaluation Division responsible for reviewing performance appraisal as well as other performance management programs from both a government-wide and specific agency perspective. As stated earlier, these efforts are designed to augment the ACE focus. A key component of the Office of Performance Management review of agency performance appraisal systems is a growing data information system. Data for the system which has been collected through direct agency reports of performance appraisal system design, nationwide surveys of agency performance management programs, and ACE evaluation reports of individual agencies or installations, provides the Office with current information on performance appraisal systems operation and deficiencies. This, with the employee data maintained in the Performance Management Information System, permits comprehensive results analysis to be accomplished prior to on-site visits. Furthermore, our proposed regulations call for agencies to submit comprehensive performance management plans for OPM review and approval before implementation. When we determine that a proposed plan will not provide for an effective performance management program in an agency we will direct that corrections be made.

The report recommends that the Director of OPM "require a second level review of employees' performance standards at the beginning of appraisal periods to ensure that those standards contain the desired characteristics of objectivity and measurability, and that standards for employees in the same job series and at the same grade level are comparable and of reasonable difficulty." Our proposed regulations will require a stronger role for second level supervisors in the appraisal process, specifically including the review of performance standards at the beginning of the period not only for the reasons stated but to ensure also that they accurately reflect the goals and missions of the organization. Our proposed regulations will also require that second level supervisors review and approve ratings before they are made final and communicated to employees. We agree that the importance of the performance appraisal process demands an active and visible role for all levels of management.

The report recommends that the Director of OPM "research the potential value of generic standards for large occupational groups that agencies could use as a basis for developing specific standards for employees in those occupations."

As the report notes, OPM previously provided to agencies samples of standards that had been developed by other agencies and it is our view that, while those were helpful in some instances, model or generic standards that agencies could use as a basis for developing specific standards would be more useful. We have a major project underway to explore the feasibility of developing generic elements and standards for large occupational groups.

The report's final recommendation is that the Director of OPM "develop and propose an amendment to the Civil Service Reform Act clearly stating that a within-grade increase is a performance-related action covered under Section 4303, and therefore granting or denying it requires only a substantial level of evidence." We believe that recent cases in the Court of Appeals for the Federal Circuit indicate that the Third Circuit's decision regarding substantial evidence will not be followed in other cases. However, we are considering a number of statutory changes to Title V aimed at strengthening pay-for-performance that would have the effect of this recommendation.

Thank you for this opportunity to respond to and comment on the proposed report. We are pleased that GAO has found that the implementation of new performance appraisal systems has been positive and we expect that our current activities and the follow up to this report will continue to result in better management of the Federal government's work force.

Sincerely yours,

Donald J. Devine
Director

(966063)

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR EAGLETON

Pay for Performance

1. Q. Do you share Devine's enthusiasum for implementation of pay-for-performance regulations?

   A. Public Law 95-454, which was signed by President Carter on October 13, 1978, requires that Federal agencies develop performance appraisal systems which use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing-in-grade, retaining, and removing employees. The Reagan Administration has chosen as one of its goals the realization of this provision of law. As the Acting Director of the Office of Personnel Management, I believe a fair and effective performance management system is in the best interests of our employee's morale and productivity.

   Q. If Congress does not extend the ban, would you, as Acting Director, implement these regulations or do you think these regulations, which have generated so much controversy, need further discussion and revision. If so, in what areas?

   A. Since publication of these regulations, Congress and the Reagan Administration have shown their intent in these matters by enacting new pay-for-performance legislation for mid- and senior-level managers. Using this legislation as guidance, I believe that the October 1983 regulations can be modified to incorporate Administration goals and the will of Congress.

   Q. Is OPM gearing up in any way to implement the present pay-for-performance regulations throughout the Federal Government or any others?

   A. I am considering the October 1983 regulations in the light of legislation enacting a performance management system for mid- and senior-level managers, and the views of congressional committees, Members of Congress, and agency officials. My concern is to move forward with an orderly process that will lead to action in the near future producing a performance management system that is fair and effective.

2. Q. OPM's highest priority, under Dr. Devine's leadership, is to make the performance appraisal system the centerpiece of personnel management in the government. What is your highest priority?

   A. Implementation of an effective performance management system is a major goal of this Administration and my office.

3. Q. You have had considerable experience in the private sector in such areas as career development and training programs, compensation systems, job classification systems, and performance evaluation procedures. What is your opinion of the workability of pay-for performance systems in general?

   A. Workability depends upon employee acceptance of and management commitment to a system that is not only fair and effective, but also perceived that way.

Q's AND A's ON OPM RETIREMENT PROPOSAL

1. Q. What is the status of OPM's retirement proposal?

   A. OPM's retirement proposal is being reviewed and revised in light of agency comments and the President's new Tax Reform Plan.

2. Q. If it is back on the drawing board, what changes are being made?

   A. As discussed in number 1 above, until analysis of agency comments and the tax proposal is complete, it would be premature to identify specific changes from the original OPM proposal.

3. Q. When do you expect to unveil it?

   A. OPM expects to have a revised proposal resubmitted to OMB in approximately one month.

4. Q. Will it be a defined benefit and/or a defined contribution plan?

   A. The answer to this question is contained in the responses to numbers 1 and 2 above.

Q's and A's ON FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM

1. Q. I imagine you heard from a variety of witnesses, all of whom had something different to say as to how OPM should manage the FEHB reserves. Can you share some opinions with us?

   A. At the May 30, 1985 public hearing conducted by the U.S. Office of Personnel Management, a variety of views were expressed concerning the disposition of reserves. While there was no consensus, most witnesses argued in favor of a gradual application of excess reserves to future premiums over time periods ranging from 2 to 5 years. Witnesses who spoke in favor of increased metal health benefits urged that some portion of the excess reserves be used for this purpose.

2. Q. How was the Blues' proposal viewed?

   A. In general, the "refund" proposal was not favored by the representatives of various organizations who gave oral presentations or provided statements for the record.

3. Q. Do you think the 30 percent reserve level is good management, or should have the reserves been disposed of before now?

   A. The current reserve level is neither good management nor bad management. Rather, it is a surplus over and above the amount needed for contingencies as a result of unusually favorable claims experience which could not be anticipated. While, with hindsight, we now know that low premiums could have been established for calendar year 1985, we did not know, nor could we predict, such an outcome when the 1985 rates were set in the summer of 1984.

4. Q. Can you inform the Committee which direction OPM may be taking on this issue, and whether you are formulating any management recommendations at this time?

   A. OPM has not resolved this question yet, but it is under active discussion within the Administration.

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